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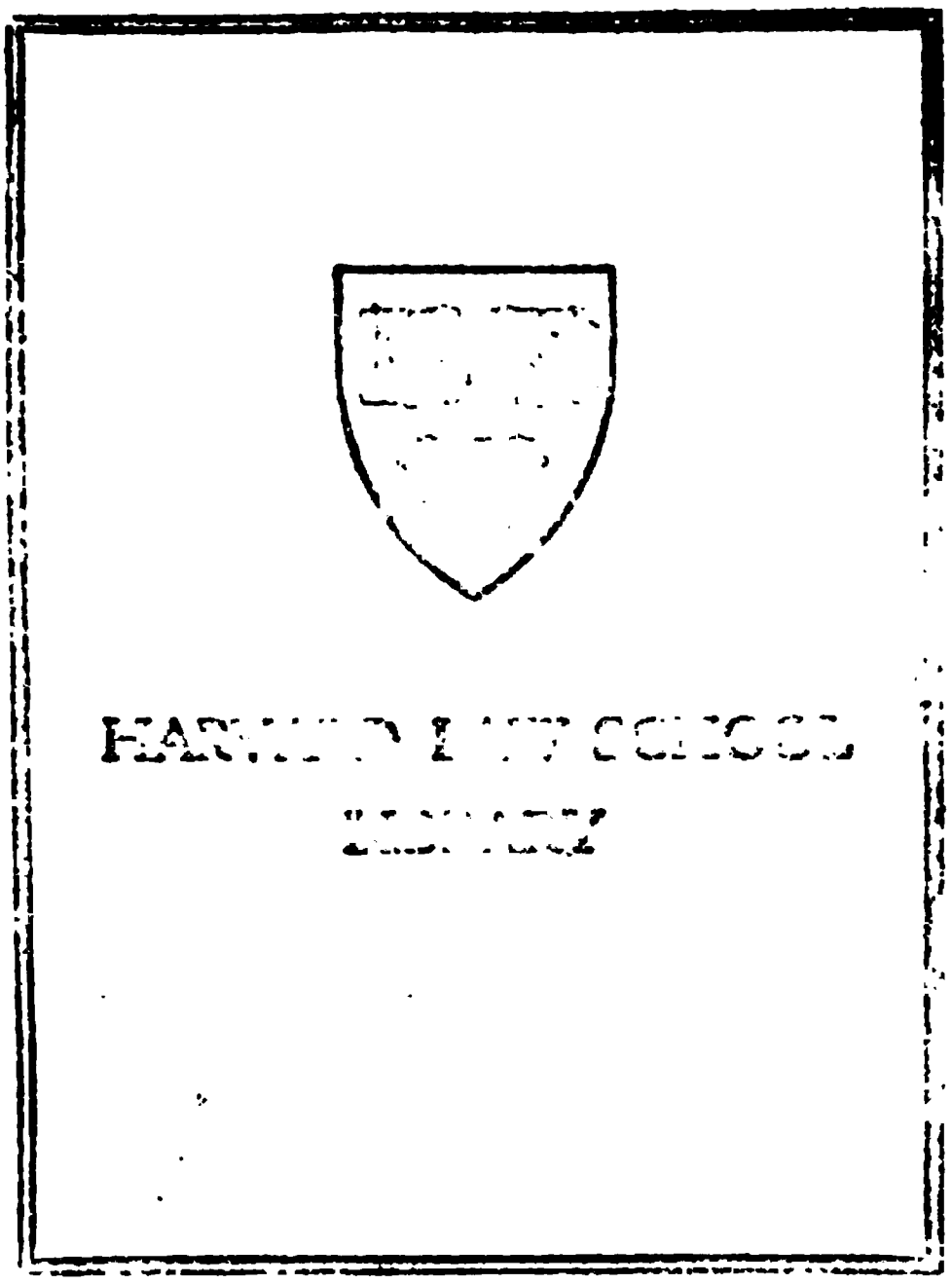

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REPORTS

9/18

OF

CASES AT LAW AND IN EQUITY,

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF IOWA.

OCTOBER 8, 1890—JANUARY 27, 1891.

BY

NATHANIEL B. RAYMOND.

VOL. I.

BEING VOLUME LXXXI. OF THE SERIES.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

JAMES H. ROTHROCK. CEDAR RAPIDS, *Chief Justice.*

JOSEPH M. BECK*, FORT MADISON.

GIFFORD S. ROBINSON, STORM LAKE.

CHARLES T. GRANGER, WAUKON.

JOSIAH GIVEN, DES MOINES.

OFFICERS OF THE COURT.

JOHN Y. STONE, GLENWOOD, *Attorney General.*

GILBERT B. PRAY, WEBSTER CITY, *Clerk.*

NATHANIEL B. RAYMOND, DES MOINES, *Reporter.*

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* MR. JUSTICE BECK succeeded MR. JUSTICE ROTHROCK as chief justice, January 1, 1891.

JUDGES OF THE COURTS,

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

DISTRICT COURT.

First District—J. M. CASEY, Ft. Madison; JAS. D. SMYTH, Burlington.

Second District—H. C. TRAVERSE, Bloomfield; E. L. BURTON, Ottumwa; W. I. BABB, Mt. Pleasant.

Third District—H. M. TOWNER, Corning; W. H. TEDFORD, Corydon.

Fourth District—GEO. W. WAKEFIELD, Sioux City; SCOTT M. LADD, Sheldon; FRANK R. GAYNOR, LeMars.

Fifth District—J. H. HENDERSON, Indianola; A. W. WILKINSON, Winterset; J. H. APPLEGATE, Guthrie Center.

Sixth District—J. KELLEY JOHNSON, Oskaloosa; DAVID RYAN, Newton; A. R. DEWEY, Washington.

Seventh District—C. M. WATERMAN, Davenport; W. F. BRANNAN, Muscatine; P. B. WOLF, DeWitt.

Eighth District—S. H. FAIRALL, Iowa City.

Ninth District—W. F. CONRAD, C. P. HOLMES, S. F. BALLIET, Des Moines.

Tenth District—J. J. NEY, Independence; D. J. LINEHEN, Dubuque; J. L. HUSTED, Waterloo.

Eleventh District—D. R. HINDMAN, Boone; JOHN L. STEVENS, Ames; S. M. WEAVER, Iowa Falls.

Twelfth District—GEO. W. RUDDICK, Waverley; JOHN C. SHERWIN, Mason City.

Thirteenth District—L. O. HATCH, McGregor; W. A. HOYT, Fayette.

Fourteenth District—GEO. H. CARR, Emmetsburg; LOT THOMAS, Storm Lake.

Fifteenth District—A. B. THORNELL, Sidney; H. E. DEEMER, Red Oak; N. W. MACY, Harlan; WALTER I. SMITH, Council Bluffs.

Sixteenth District—GEO. W. PAINE, Carroll; CHAS. D. GOLDSMITH, Sac City.

Seventeenth District—L. G. KINNE, Toledo.

Eighteenth District—J. D. GIFFEN, Marion; J. H. PRESTON, Cedar Rapids.

SUPERIOR COURTS.

Cedar Rapids—JOHN T. STONEMAN.

Council Bluffs—J. E. F. MCGEE.

Creston—S. R. DAVIS.

Keokuk—HENRY BANK, JR.

PREFACE.

The reporter deems it proper in presenting this first volume of his reports to the profession to indicate the standpoint from which the work has been done.

In his opinion only those opinions should be published in the reports which are valuable for precedent. This would exclude many opinions which contain a mere reiteration of rules long established, and those which turn upon peculiar states of fact, and are not likely to become useful by analogy in the application of legal principles. But the law (Code, sec. 145) confers upon the supreme court the discretion in this matter, and in the opinion of the court *all* opinions should be published.

Care has been taken to present in the syllabus to each case a digest of those questions only that are determined by the opinion. To include therein statements made by the court *arguendo* is misleading, nor have they properly a place there. While the syllabus should be brief, it should be sufficiently full to be intelligible, yet not to serve as a substitute for the opinion.

The law (Acts, 18th Gen. Assem. ch. 60, sec. 1) makes it the duty of the reporter to furnish for publication, "in all cases where he may deem it of sufficient importance, the legal propositions made by counsel in the argument, with authorities cited." The value of an opinion by any court, involving the determination of new questions, must, of necessity, depend in a measure upon the ability and learning shown in the arguments of counsel. If a question be determined by the court contrary to the opinions of respectable authorities, and it appears that the attention of the court was not called to such authorities, nor to the propositions upon which their conclusions are based, it may reasonably be presumed that the court with such additional light might have reached a different conclusion, and may be persuaded to change its position upon a subsequent presentation of the question. The converse of this proposition is also true. And if the bar finds that a cause has been presented with reasonable ability, and

that the opinion of the court has been rendered in the light of decisions by other courts of high standing, it will hesitate in attempting to secure a different determination. That the bar may be furnished the information upon which to base its judgment of an opinion, and that it may have the benefit of the briefs of counsel where they are of peculiar value, is believed to be the purpose of the above provision. In this view it is not simply the arguments which show the greatest learning that ought to be published. The very fact that an argument is so deficient in the proper presentation of a cause as to afford little assistance to the court in its determination may be the best of reasons for its publication. The number of cases which call for a publication of abstracts of the arguments under these rules is likely to be comparatively few. Among the one hundred and sixty-two cases published in this volume but eight such were found. The abstracts should be brief, but not so much so as to destroy their value. To give the authorities without the propositions to which they are cited would be practically valueless. Some of such abstracts contained in this volume are perhaps too long, and it will be sought to avoid this defect in future volumes.

In the opinion of the court, and of the reporter as well, resolutions and addresses presented to the supreme court as memorials of the death of members or ex-members of that bench ought to be preserved in these reports. How far the practice should be extended, however, as to such proceedings in relation to other members of the profession it is a little difficult to say ; but it would seem that the decease of members of the district court, and of the bar, who have distinguished themselves for their learning and ability in the profession, should receive such recognition. Space is, accordingly, given in this volume for such proceedings in relation to ex-Judge ADAMS, of the supreme court, and ex- Judge MITCHELL, of the district court.

A few changes have been made in matters of form and dress, which, it is believed, will facilitate the use of the reports. For the double page title that has obtained heretofore, has been substituted the case title alone in small capitals, thereby making it more prominent, and at the same time saving about fifteen hundred lines to the volume, which means a net increase of thirty-five pages of matter in each volume. The parties, plaintiff and defendant, are usually referred to in the opinions of appellate courts as appellant and appellee, and it is not always clear to which of the parties to a cause these titles belong,

though the information is frequently necessary to a correct understanding of an opinion. That it may be seen at a glance who are such parties, they have been indicated in the title to each cause. There will also be found, wherever the book is opened, except in the appendix, the number of the volume in the present series of reports, the term at which the opinion was rendered, and, at the commencement of each case, the day and date of filing.

The reporter has availed himself of such improvements as were suggested by the work of the best reporters, and is pleased to acknowledge many suggestions from his predecessor in office, Mr. Ebersole, and from others of the bench and bar. The defects of the present volume he will endeavor to avoid in the future. The following cases in this volume were reported by Mr. Ebersole: *State v. McGee*, *State v. Sipult*, *Connecticut Mut. Life Ins. Co. v. Brown*, *Moore v. Marshalltown Opera House Co.* and *State v. Illsley*.

The importance of the prompt publication of the decisions of the supreme court is fully appreciated by the reporter, and he regrets the delay in the appearance of this volume, chiefly because of reasons over which neither he nor the publisher had any control, and partly by reason of the delay necessarily incident to taking up a new work of this kind. The succeeding volumes will be hastened so far as is consistent with good work, and within the coming year the lost ground will probably be recovered.

N. B. R.

Des Moines, Iowa, December, 1891.

IN MEMORIAM.

AUSTIN ADAMS.

The Honorable AUSTIN ADAMS, a member of the Dubuque county bar, and one of the justices of the supreme court from January, 1876, to December, 1888, died at his home in the city of Dubuque on October 17, 1890. At the January, 1891, term of the supreme court, Mr. Louis G. Hurd, of Dubuque, addressed the court as follows:

With Your Honors' permission I rise to call to the formal notice of this court an event of which every occupant of this bench has personal knowledge. On October 17, 1890, the Honorable AUSTIN ADAMS, a resident of the city of Dubuque, a member of the Dubuque county bar and an ex-member of this court, departed this life. Although his death was preceded by a tedious illness, which, in a measure, prepared us for the result which followed, it is nevertheless true that the announcement of his demise came to his friends with a shock none the less keen because it was not unexpected. No previous preparation could cause the knowledge of the death of AUSTIN ADAMS to fall lightly upon those who knew him.

Ordinarily, in the death of a man, the only losers are the members of his family. Not so in this case. The legal profession and the state at large are sufferers by the death of Judge ADAMS. Lawyers of his rank are too rare, the need for men of his caliber is too great, to permit his death to take place without consciousness of great loss.

A meeting of the bar of Dubuque county was at once held, and thereat, among other proceedings, were adopted the following resolutions, which, on behalf of the bar, I present to this court for its official action:

Resolved 1. That in the death of the Honorable AUSTIN ADAMS, a member of this bar for over thirty-six years, and a judge of the supreme court of this state for twelve years, the bar and state have lost a fellow member and citizen, distinguished alike for uprightness, purity and unselfishness of character, for simplicity and courtesy of manner, for great industry and learning both within and without his profession, and for the highest attainments and usefulness as lawyer, judge and man.

Resolved 2. That we tender to the family of our deceased brother our sincere sympathy, and that a copy of these resolutions be sent to them.

Resolved 3. That a copy of these resolutions be presented to the state and federal courts for such action thereon as is usual and proper.

In thus obeying the direction of the Dubuque county bar, I may be permitted to say a word concerning the man. And as every view is governed by the point of observation which is occupied, perhaps I might premise by stating my opportunities for knowing Judge ADAMS. Twenty years before his last illness, I entered his office as a student. From that time until his death, my residence was within three squares of his, and, until he exchanged the bar for the bench, my office was either just across a hall, or just across the street from his. I might think that the warmth of my personal regard for him, which arose upon our first acquaintance, had, in some degree, warped my opinión of him, were it not for the fact that association with him in later life but served to confirm my early estimate of his character, and for the further fact that the judgment of others, whose opportunities for knowing him well were far better than mine, coincides with mine.

Judge ADAMS was born May 24, 1826, in Andover, Vermont. His father, a soldier of the war of 1812, was a prosperous farmer for that country, and a prominent man among his fellow-citizens, having served in legislature, on school boards, etc. Very early in life, indeed, before he ever saw a court or a lawyer, Judge ADAMS says that the profession of law had a perfect fascination for him, and to this natural inclination the legal profession is indebted for the benefit it has derived from his legal and judicial work. When he was thirteen years old, his teacher urged upon his father that the son should receive a better education than he could procure at the district schoolhouse which, with the small Baptist church, stood in the edge of a grove upon the father's farm. This counsel resulted in his being sent to an academy at Townsend, Vermont, and to Black River Academy at Ludlow, Vermont, where he prepared for college. At nineteen, he entered the sophomore class of Dartmouth, from which he graduated in the class of 1848. I have no doubt that at college he was an indefatigable dig. On one occasion, years afterwards. in referring to a college mate, he said to me, "Yes, we were in college at the same time, though I did not know him intimately then. The students were of two classes—boys and blues; he was a boy, I was a blue." After graduating, he attended Harvard law school for a time, and still later pursued his legal studies while principal of West Randolph Academy. Among the persons whom he there prepared for college was the late Honorable F. M. ROBINSON, who. ten or fifteen years later, after both had removed to Dubuque, became his partner. In January, 1854, he was admitted to the bar at Woodstock, Vermont. From data furnished by his family, I find that he at once formed a law partnership with ex-Governor Coolidge. The firm lasted, however, but a few months; for, shortly after, the junior member became imbued with a desire to seek a home in the then promising West, and came to Dubuque. I think it must have been this partnership to which I heard him refer twenty years later. He was talking of the opportunities which his old Vermont home offered to young men, and the motive which had prompted him to come West. His then partner, he said, urged him to remain in Vermont, and, as an inducement, prophesied the building

up of a joint practice, if he would stay, which would yield each member of the firm six hundred dollars a year.

He reached Dubuque early in the high tide of prosperity which preceded the panic of 1857. Like many others, he was drawn into real-estate transactions, and, like them, suffered from the depreciation of values which came with the crash. From this time forward, speculations had no attraction for him, and I think he thereby became the more faithful lover and the more complete servant of the profession to which he was attracted so early in life. I remember, early in the seventies, his partner offering him an interest in a small purchase of real estate, which gave excellent promise of a large percentage of profit; but Mr. ADAMS said, "No, I have already had all the profits of real-estate transactions I can afford." On arriving at Dubuque, his natural liking for books and study cropped out at once. During the first winter of his residence there, he conceived the idea of organizing a public library, and solicited the donation and loan of books from private libraries to that end. He also delivered a series of lectures, the proceeds of which were devoted to the same purpose. The books thus procured were kept at first in his own office, and from this nucleus has grown our Young Men's Library Association, which is a leading institution of its kind in Iowa, and one of which Dubuque is justly proud. Early in his residence in Dubuque, he took a prominent part in a movement which, to those who knew him only in later years, seems strange indeed. He was one of the organizers of the Republican party in Dubuque, and, with Honorable O. P. SHIRAS, the late H. A. Wiltse and others, took an active part in the Fremont campaign. Those who know how little natural taste he had for political life can see that in this course he was prompted solely by his belief in the principles of early republicanism, and by his consciousness of his duty in that regard. In 1861, the Young Men's Christian Association of Richmond, Virginia, made an appeal to all its kindred organizations in the north, for co-operation in a movement which should permit "the erring sisters to go in peace." This circular letter reached the Young Men's Christian Association of Dubuque, and Judge ADAMS, then one of its officers, replied in a letter so scathing and so unanswerable as to cause it to be copied into almost every loyal paper in the north.

I doubt if any man in Iowa has received greater recognition of his intellectual endowments and scholarly attainments than Judge ADAMS. For many years he was president of the non-partisan board of education of his adopted city, and in its entire history it never had a more valuable member than he. He was instrumental in the organization and maintenance of The Round Table, a gentlemen's literary club, which flourished in Dubuque for nearly, if not quite, a quarter of a century. He was an active member of the Iowa Institute of Science and Arts, an organization the object of which is told in its name. For seven years he was a regent of the University at Iowa City, for about the same length of time a trustee of Humboldt College, and for fourteen years he was one of the professors in the Law Department of the State University. Early in the sixties he had acquired an enviable

reputation at the bar, and prior to 1870, when I first knew him, his fitness for a seat in this court was recognized by the entire bar of the state. In 1876, he became a judge of this court, which place he occupied twelve years. In 1883, his college, Dartmouth, conferred upon him that which he richly deserved, the degree of LL. D. During the years of his residence in Dubuque, upon special request, he prepared and delivered public addresses upon intellectual topics, which, if printed, would fill a volume. These acts of public recognition are not meaningless, and in no case could they more fully attest the merit of the recipient than in his.

This skeleton of the events of his career does not give even an indication of his real life. It is impossible to speak or think of him as a lawyer, independently of his position as a citizen and a man.

As must be seen, his studies did not end with his graduation from college. Indeed, with him, his college course was but the preparation for a life of study. In all of the intellectual growth and development which has taken place during the last fifty years, Judge ADAMS kept abreast of the foremost, and, during all that time, no lover of true education could pass an hour in his society without being the gainer thereby. Such a man could not live in a community for thirty-six consecutive years, without leaving thereon an indelible impression of his worth.

To such a mind as his, law was a delight. His manner in the presentation of facts to a jury was not only clear and lucid, but analytical and convincing. In his argument upon the law of a case to a court, his style was even happier. For fustian and clap-trap he had no use. *He never tried a case to the back seats.* In a trial, he had but one object in view,—to win his case by the greater weight of law or evidence, and never by those artifices, unfortunately too frequently employed, which tend to lower rather than to raise the standard of professional ethics. If he had a failing in this regard it was that he inclined to deal with his adversary as using only the weapons which he, himself, employed, and that a discovery that the methods of his antagonist were not morally commendable did not always have the effect to prepare him for a similar means of warfare upon a subsequent occasion. He was always in earnest—never in fun; yet he had a keen sense of genuine humor, which at times he employed with excellent effect. That he was strictly honorable in all things, goes without saying.

Ordinarily, he did not pass for a man of the people. He was not a "hail fellow, well met." A peculiarity of vision had the effect to withdraw him somewhat from that companionship with the public generally, which enables some men to maintain such large followings. This enforced restricted companionship was, at once, a loss and a gain, to both him and to his fellow men. In so far as it prevented him from knowing other people and other people from knowing him, it was a loss to both. But it had the effect to force him more frequently to seek his own thoughts for companionship than he might otherwise have done. This brought about in him that high mental polish which

so few people attain, and in this he and his intimate friends were decidedly the gainers. As a matter of fact, however, he was a man of the people. The young men of the Dubuque bar ever found in him a kindly adviser and a considerate friend. The ordinary marks of rank, such as are conferred by wealth and the like, were nothing to him. By the simplicity of his living he proved that the best things in this life can be enjoyed with very little money, and that it is not necessary to spend all one's energies to amass wealth in order to acquire culture and refinement. True worth and merit, regardless of their surroundings, never passed him unrecognized.

But it was reserved for those who knew him in his private and his family life to take his full measure. He sought illuminated souls rather than illuminated houses. The motives which guided him in his household could be the motives of the humblest and the poorest man—divine life, with cheap living. It has been said that his grave aspect and reverend counsel covered a heart glowing with the sweet kindnesses and charities of domestic life. He was an intensely religious man, but not in the ordinary acceptation of the term. There was about him no cant, no manifestation of outward forms. Sacred things with him were not necessarily Asiatic or Roman. His religion was of the most rational type. For years it was his habit—not known to the world—to put upon paper little gems of thought which came into his mind when it was in its most receptive mood. Among the lines thus preserved are these, taken from the body of a little poem:

But he who lives a noble life,
  And writes himself upon his age,
Will leave behind him, when he dies.
  By far the fairest, brightest page.

And these from the same:

But God will never lose from sight
  Those fairer ones than these,
Whose bended spirits seek for light,
  Though not with bended knees.

The altar which the spirit builds
  Is always in the heart;
And God his richest peace distils,
  From earthly fanes apart.

On being asked to make a contribution to the columns of a legal magazine, he sent the following lines, which have been termed almost playful in their adaptation of legal phraseology to a graver subject:

Surveyor's lines have marked the earth,
  Almost, it seems, from pole to pole;
And deeds of parchment cover it,
  Whereby its granted, bargained, sold.

But there is yet a bright domain
  Whose title deeds no lawyers draw,
Nor parties litigate in court,
  Alleging some pretended flaw.

That bright domain is beauty's realm,
As boundless as the human soul;
He owns the most who sees the most,
And each may own from pole to pole.

For all that is the very best in culture and in the betterment of the intellect, his house was the home, and for it his door was ever open wide. In his family he sought to show, by precept and example that every thought and act, whether good or bad, must bear fruit, that excellence was attained only by constant attention to the present, and that the acme of excellence was open to all. In this vein was written his lines, entitled

TO-DAY.

To-day has been a common day,
At least so far as we can see.
The cheerful light was common light;
The birds were blithe, the winds were free.

But stop! Earth has no common day,
At least not now nor in our time;
Immortal deeds to-day were wrought
Somewhere, in this or other clime.

Some poet's pen was dipped in light,
Or senate waked by voice of power,
Or daring soldier's form laid low
Where smoke and dust of battle lower.

Or, it may be the deed achieved,
By which the race is lifted higher,
Was some humble grimy deed,
Wrought in mechanic art and fire.

Of his judicial labors others will speak. His decisions which form a part of the written law of this state show the character of the monument he builded for himself, and words upon that branch of his life would illy become me in this presence.

Yes, AUSTIN ADAMS is dead; but, as I move that these resolutions be spread upon the records of this court, there comes unbidden to my mind a thought voiced upon a similar occasion. No, he is not dead. The effect of such a life as he lived cannot pass away. His deeds do not go down into the grave with him. While to his face, his form, his frame, we say, regretfully, "Farewell! Goodnight," to his precepts, to his example, to his efforts toward the elevation of his kind, to his work upon the jurisprudence of the state of which he was so proud, we may confidently say, "Hail! Good morning!"

Upon the conclusion of Mr. Hurd's remarks the court was further addressed by Honorable JAMES G. DAY, as follows:

May it please the court: I should do violence to my own feelings, should I remain silent when a tribute of respect is being offered to one whom I knew so long and well, and esteemed so highly. It was my good fortune to be associated with Judge ADAMS in a judicial capacity from the first of January, 1876, for a period of eight years. It has always been a source of gratification to me, that I enjoyed in so large a measure, as I believe I did, his confidence and regard. He was a man of accurate learning, and superior general culture. He was a

profound student, and a clear, methodical and correct writer. His reasoning was astute and convincing. His pen was a Damascus blade, which he wielded with the precision of an Apollo, and the strength of a Hercules. His love of justice dominated every other purpose and object. The perpetration of a wrong jarred upon his sensitive nature, like a discord upon the ear of a skilled musician. He set before himself no other object, he was actuated by no other purpose, than the attainment of exact truth, and to this he bent all his energies regardless of popular approval or clamor. He was never the exponent of any particular doctrine or the champion of any particular idea. During the whole period of my association with him, I never heard him suggest the popular effect of a decision as a reason for, or against, any proposed line of determination, and such considerations, I am convinced, had no influence upon him whatever. It has been said that a block of marble endowed with intellect would present the most complete example of a perfect judge. There is a sense in which this is true, and a sense in which it is not true. A judge needs not be oblivious to the weaknesses and the sufferings of humanity, but he must not permit his sympathies to warp his judgment, or his feelings to dethrone his reason. Judge ADAMS held the scales of justice with an absolutely even hand. In his adjudications the blindfolded goddess had no reason to fear partiality or complain of prejudice. He was no more swerved from what he believed to be right, by the hope of popular applause, or the fear of popular displeasure, than would be a marble statue. Over the entrance to a cemetery at one of the national fortresses, where sleep in unmarked and undistinguishable graves thousands of the Confederate dead, who, honest, but misguided, laid down their lives in defense of a defenseless and "lost cause," is inscribed this charitable maxim of the ancients: *De mortuis nil nisi bonum.*

No such maxim needs be invoked by him who speaks of the life and character of Judge ADAMS. No one who truthfully speaks can say aught but good of our departed friend. His life was exceptionally pure and blameless. During a period of eight years I never heard him suggest a thought, or utter an expression, which would have been out of place in a drawing room of the most polite society. It was his misfortune to ask a continuance of popular favor at a time when popular prejudices were in the ascendant, and when the tempest of popular passion was accustomed to uproot everything that did not bow before it. It may even yet be too soon to expect exact justice to be done to his excellences as a man, or his merits as a judge. But when passion and prejudices have subsided, when sober reason resumes her wonted place, the future historian will rank Judge ADAMS amongst the purest, wisest, ablest of the judges of the court which I now address.

Affectionate friends may rear to his memory marble column or granite shaft, but the most enduring monument to his fame is found in the thirty-two volumes of the decisions of this court, which contain his opinions. Whilst letters endure, and civilization remains, his fame is there secure. He has there "a monument more lasting than brass,

and more sublime than the regal elevation of pyramids, which neither the wasting shower, the unavailing north wind, nor an innumerable succession of years, and the flight of seasons shall be able to demolish."

His lifework, nobly done, securely awaits the judgment of the future.

I second the request that the resolutions reported be spread upon the journals of this court.

Mr. Justice ROTHROCK, on behalf of the court, responded to the resolutions and addresses of counsel as follows:

In the year 1876, AUSTIN ADAMS and myself became members of this court, and he remained for twelve years. During that time we were engaged in the same work, side by side, and literally "went in and out together." The relation of judges in the same court is sometimes designated as that of brother. The nature of the occupation is such that the term is not inappropriate in a social sense. It involves close and almost continuous personal association. Judge ADAMS impressed a stranger as a man of great dignity, amounting almost to austerity, and yet, when approached, he was the most genial, companionable and unselfish of men. No man excelled him in his consideration, sympathy and charity for others.

He was a most valued member of the court in consultation. He always expressed his views on any question under consideration in such a way as to impress his associates with the thought that he understood the matter in hand precisely, and while slow to come to a final conclusion, and patient in investigation, when his mind became satisfied as to the proper decision to be made, he maintained his position with great firmness and supported it by the most convincing reasoning. He was never garrulous, never wandered from the very question to be determined, and never attempted to evolve the law from his mere "inner consciousness." He paid due respect to precedent, but determined for himself the soundness of the reasoning upon which precedents were based. He always sought to reach some controlling principle upon which to base his conclusion. He was for four years the chief justice of this court. As a presiding officer he was remarkable for his courteous manner and uniform kindness to the bar and the public.

It is well known that he was not only profoundly learned in the law, but was a most accomplished classical scholar. He pursued the classics as a student in college, and he taught the classics for a time as an educator, and he never abandoned his literary studies even while engaged in the arduous and exacting labors required of him as a member of this court.

The opinions of this court as prepared by Judge ADAMS will be found from the forty-second to the seventy-third volumes of our reports. These opinions are models of pure English, and command the respect of the bar and the public as correct expositions of the law, ably, clearly and concisely expressed. One feature of his opinions worthy of mention is that although learned in the classics he never resorted to quotations from the Latin or any other language than the

English. He believed that as the English language was employed in the courts of this country, it was pedantry to attempt the use of any other. He never at any time put his scholarly attainments on parade. His natural modesty and simplicity of character precluded an exhibition of learning, unless for some reason it became necessary.

He was not dogmatic; his opinions all through show that kindliness of heart which was ever present with him, and, as one side in every legal controversy must suffer defeat, he always endeavored to administer the law without harshness of expression, and with courteous and at times sympathetic language. One instance of his charity for others I may relate. On one occasion an attorney engaged in presenting his case to the court was very vehement in his language and gesticulations, and failed to present any points worthy of consideration. While the argument was in progress, I said to Judge ADAMS, in a whisper: "Why can't we see ourselves as others see us?" referring to the effort of counsel. The reply was, "It would never do; if we did, many of us would go out and hang ourselves."

Judge ADAMS was always of frail physical organization, and yet he retained all of his mental vigor until within a few hours of his death. Some time before that sad event I visited him, and, although he had then suffered intensely for many weary months, I found him in the full possession of all his mental power.

He was in that tranquil state of mind by which he was enabled to

> Calmly look on either life, and here
> Saw nothing to regret, nor there to fear.

And as I stood by his open grave and cast in a sprig of evergreen, I thought of the closing words of the masterly oration which was spoken over his dead body: "Hail! noble brother of a noble race, and, for awhile, farewell."

After some further remarks by Chief Justice BECK, who testified to his high appreciation of Judge ADAMS' ability as a member of that bench, the resolutions presented by Mr. Hurd were ordered spread upon the records.

JOHN MITCHELL.

Upon the same day that the foregoing proceedings took place, resolutions were presented to the court respecting the death of the Honorable JOHN MITCHELL, for twelve years the judge of the circuit court for the fifth judicial district.

Hon. JAMES G. DAY, in presenting the resolutions, addressed the court as follows:

If Your Honors please: I have been delegated in connection with Judge BISHOP and James C. Hume, Esq., to present to this court resolutions adopted by the Polk County Bar Association, respecting the death of the Honorable JOHN MITCHELL, and to request that they be spread upon the records of this court, in which he was, for many years, a prominent practitioner. It is a mournfully pleasant duty which has been imposed upon us. Whilst our heads are bowed in sadness, and our hearts bleed at the loss of one whom we had all learned to respect and love, yet we rejoice that we are permitted to offer some tribute, however humble, to the memory of our departed friend and brother. It is eminently fitting that we should all, for an hour, step aside from the engrossing pursuits of business, forget the exacting demands of our profession, lay aside our aspirations and apprehensions, and, with heads uncovered around the open grave of our departed companion, drop a tear in his memory and cast a flower in his tomb. The death of JOHN MITCHELL fell upon us with such appalling suddenness, and was so unlooked for, that we can scarcely yet realize that he has gone from us, never to return. A man of the most abstemious and correct habits, husbanding his resources with the most scrupulous care, never permitting himself to be wrought upon by any undue excitement, to all human observation it seemed that he had scarcely passed the meridian of an active life, and that his best and most prosperous days were yet in store for him. Alas! how little can the finite comprehend the purposes of the infinite. Just eleven days before his death he left his office a little earlier than usual, complaining of an indisposition so slight as not to cause himself or his most watchful friends any alarm, and believing that a few hours of rest and quiet would restore him to his normal condition of health. An inscrutable Providence had otherwise decreed. During the night his sufferings became so intensified that medical assistance was summoned, and then it was discovered that his disease had already assumed a very alarming character. All that the most skilful physicians could do proved unavailing. All that the most loving hearts could suggest, or the most loving hands could execute, was to no purpose. His

disease rapidly and surely progressed until Monday morning, the twenty-ninth day of December, when he crossed the dark river and went over into the Silent Land.

Judge MITCHELL was born in New Hampshire, February 28, 1830. He was educated at Kimball Union Academy and Dartmouth College, but, on account of failing health, he was compelled to leave college before graduating. Early in life he hopefully followed "the Star of Empire" in its westward course, to where a newer and more earnest and active civilization offered a more extended arena for the exercise of his youthful faculties, and gave promise of higher advancement and a greater reward.

Arriving in Des Moines in 1856, he completed his law studies in the office of those two gifted adopted sons of Iowa, one of whom by his impassioned eloquence so often stirred its popular assemblies to its deepest depths, and who now, where the declining sun sinks in the ocean, has entered upon a career of renewed activity and increasing promise; the other of whom with a body broken by disease, but a mind sustained by the loftiest aspiration of patriotism, poured out his life in its early noon upholding his country's banner and defending his country's honor. In August, 1856, he was admitted to the bar, and the following year he commenced the practice of his profession.

On December 29, 1858, at Moundsville, West Virginia, he was married to Rebecca Anshutz. To them there were born two children, one only of whom survives. Here in this city his professional and official successes were achieved. Here for more than a third of a century, by a life of the strictest probity and purity, he endeared himself to his neighbors and established a place in their affections as lasting as their own lives. Rarely has anyone commanded such universal confidence and respect. Rarely has a death in the city caused such universal and profound feeling.

Upon the organization of the circuit court, Judge MITCHELL was elected one of the circuit judges for the Fifth Judicial District, commencing his term January 1, 1869, and continuing by successive elections for twelve years, when he declined a re-nomination and voluntarily returned to the practice. As a lawyer he was accurate, painstaking, discreet, judicious, conservative, industrious and honest. Whilst he conceded to his clients the full measure of his professional talents and learning, he never allowed them to control his conscience. He never accepted the heretical dogma that a lawyer is justified in doing, or required to do, for a client, what he would scorn to do for himself. He did not believe the jesuitical doctrine that the end justifies the means. He did not believe that a lawyer was absolved from all obligation to be consistent. He did not believe that in law, as in war and politics, everything is fair. He believed that in law, as in mathematics, the shortest distance between two points is a straight line. He never undertook to deceive a court by a misrepresentation of fact, or a known misstatement of law. Law, with him, was not a means but an end. It was not merely an employment for earning a livelihood, but an instrument for the advancement of right and the

repression of wrong. He believed with Burke that law is "the pride of the human intellect, and the collected wisdom of ages." He believed with Hooker that "her seat is the bosom of God, and her voice the harmony of the world." Such views necessarily produced a reflex influence upon his whole character. His life was without stain; his character was above suspicion. The finger of reproach was never pointed at him; the tongue of scandal never dared assail him. As a judge he was patient, attentive, kind, courteous, considerate and dignified. He never lost sight of the fact that the ultimate object of a lawsuit is the attainment and enforcement of right. He possessed two mental characteristics, without which I am persuaded the most exalted talents and greatest learning will ever fail to constitute a great judge, the possessor of which possesses half the qualifications of a judge, without an hour's study; a nice appreciation of justice, and a purpose to see it prevail.

As a citizen Judge MITCHELL was honest, upright and public-spirited; and in every relation and under all circumstances he was always a plain, true, dignified, manly man.

His life resembled not the ocean, lashed into fury by the tempest, dashing and breaking its crested waves upon a rock-girt shore; but rather a placid lake in some forest-protected vale, unruffled by any wind, undisturbed by any storm. He did not blaze like a comet, nor dazzle like a meteor in its eccentric course across the heavens; he rather shone with the steady and benign light of a star.

Your Honors: There comes a time in every life when everything to which human ambition can aspire, everything which human industry can accomplish, everything which human genius can compass, proves unsatisfying aud unavailing. The greatest orator and statesman this country ever produced, when nearing the close of a long and not unappreciated life, said: "I have given my life to law and politics. Law, I have found uncertain, and politics, utterly vain." It is at such a timo that the spirit yearns for something more stable and satisfying beyond, into which to cast the anchor of hope. Crowning all the excellences in the character of our departed brother, he was an earnest, consistent christian, not noisy or obtrusive, but honoring his profession by an upright walk and conversation, by deeds of kindness and a life of purity. Our departed brother, though dead, yet lives; lives in the results of a life-work nobly done; lives in the fragrant remembrance of worthy acts; lives in the affections of his countrymen; lives in the full fruition of eternal blessedness, in a land where death never enters. "He has not all died: the greater part of him has escaped the shades of death." Let us, Your Honors, emulate his virtues, and profit by his example, remembering that "he best praises the dead who lives as they desire."

It but remains that I present the resolutions of the bar association, and request that they be spread upon your journals:

Resolved, That, on the death of JOHN MITCHELL, the bar of this state has lost one of its ablest and most highly e[illegible]med members, and the state herself a most exemplary man and citizen. Coming to this

city a young man, and having served his city, county and state in the several capacities of councilman, supervisor and assemblyman, he was afterwards honored by the people by an election to the judgeship of the circuit court of this district, a position which he filled with signal ability, and voluntarily relinquished to again enter the ranks of his profession. While occupying a position upon the bench, he also discharged the onerous and exacting duties of register in bankruptcy, administering vast estates, and always with the approval of the United States courts, and to the satisfaction of all persons with whom, by the duties of his office, he was brought into contact. At the bar, as upon the bench, he was always distinguished by great care and painstaking in the discharge of duty, with a keen sense of its obligations, whether in public or private relations. Ever kind and courteous, and especially considerate of younger men, he was always positive in asserting, and firm in maintaining, what he believed to be right.

Distinguished as he was in his profession, he was no less remarkable and exemplary in his private life. Burdened with business cares requiring many hours each day in his office and in consultation with the officers of the various corporations with which he was connected, he still freely gave largely of his valuable time to the city library and to the church of which he was a devout and devoted member. He never shirked the duties of his citizenship, but was usually found in the caucuses and conventions of his political party, aiding in his quiet and dignified way in the formation of party platforms, and the selection of suitable candidates for office. In short, wherever he was placed, whether on the bench, at the bar, or in his office, in the director's room, the political convention, the meeting of the vestry of his church or in his home, he was always the same able, courteous, christian man. Surely the world is better for the life of such a man, and, in his seemingly untimely death, we have all lost an esteemed friend and brother.

Resolved, That we hereby extend to his bereaved wife and daughter our most sincere sympathy; that a copy of these resolutions be sent to them, and that the supreme court be requested to direct the same entered upon its records.

The court was further addressed by Honorable C. C. NOURSE, Honorable C. C. COLE, Honorable WILLIAM PHILLIPS, Mr. C. A. Dudley, Mr. Jas. C. Hume and others, all of whom testified to their high regard for the deceased.

Mr. Justice GIVEN, for many years the intimate friend of Judge MITCHELL, responded on behalf of the court. His remarks were not in writing, and we are, therefore, unable to include them in this record. Upon the conclusion of Judge GIVEN'S remarks, the resolutions presented by Judge DAY were ordered spread upon the records.

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REPORTS

OF

CASES AT LAW AND IN EQUITY,

DETERMINED BY THE

SUPREME COURT

OF

THE STATE OF IOWA,

AT

DES MOINES, OCTOBER TERM, A. D. 1890

IN THE FORTY-FOURTH YEAR OF THE STATE.

DON D. SPRAGUE, by GEO. D. SPRAGUE, His Next Friend, Appellee, v. S. & J. C. ATLEE, Appellants.

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1. **Master and Servant: JURY: CHALLENGE FOR CAUSE.** A juror, who was a member of the regular panel, upon his examination as to challenge for cause, stated, that he had heard one of the parties to the cause make a statement in regard to the merits of the controversy, and had formed an opinion which would require evidence to remove, but that it would not prevent him from rendering a just verdict on the evidence. *Held*, that the action of the trial court in sustaining a challenge to such juror, made under subdivision 9, section 2772 of the Code, would not be regarded as erroneous, although such challenge might properly have been overruled.

2. ———: NEGLIGENCE OF COEMPLOYE: RATIFICATION: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE. A boy of thirteen years of age, employed in a sawmill for the work of removing sawed materials from a steam saw, was directed by the boss or foreman of the establishment to operate such saw, in the absence of the usual operator, without giving him instructions as to the proper manner of operating the same, nor of changing the gauge thereof, and such direction was subsequently ratified by the common employer. While so employed the boy received orders to saw a particular kind of material, which, if obeyed, would not have exposed him to the danger resulting in the injury received; but he refused to obey them. Subsequently he received different orders, which he obeyed; and afterwards, while engaged in changing the gauge of the saw, the boy, without fault on his part, received the injury therefrom upon which this action is based. *Held*, that, in view of the subsequent change of orders, and his obedience thereto, the boy was not guilty of contributory negligence on account of his disobedience of orders previously received, nor because other methods of changing the gauge, which were beyond his strength, were less dangerous than the one adopted.

3. ———: DEFECTIVE MACHINERY: EVIDENCE. In an action for damages for a personal injury sustained by an employe while operating a steam saw, which was shown to be less generally used than other machines of its kind, and the operation of each described to the jury, the testimony of an expert that the gauge of the machine used by the defendant is as safe as that of any other machines then in use is inadmissible.

4. ———: ———: ———. Testimony of the apparent intelligence of a minor, and of his apparent understanding of mill machinery, is not competent as proof of his capacity to operate such machinery. Moreover, where such minor has testified upon the trial the jury are as competent as others to judge of his intelligence.

5. ———: ———: ———. The exclusion by the court of competent testimony of a witness, the substance of which has previously been given by him in evidence, and permitted to remain in the record, is error without prejudice.

6. ———: ———: ———. Where the statement of the issues in a cause prepared by the court for the jury was submitted to the attorneys for defendant, and approved by them, the defendant cannot be heard to complain upon appeal that the portion of his defense set out in an amendment to the answer was not submitted to the jury.

7. ———: INSTRUCTIONS TO JURY. Great length in the instructions of the court to the jury, and the frequent use therein of terms calling the attention of the jury to the youth and inexperience of the plaintiff, will not constitute grounds for reversal upon appeal, where there is nothing to indicate in the record that the defendant was prejudiced thereby.

8. ——— : NEGLIGENCE : DAMAGES. A verdict for damages in the sum of seventy-five hundred dollars for an injury resulting in the loss of a hand to an employe in a sawmill, whose expectation of life is about forty-six years, *held*, not excessive in view of the facts of this case.

Appeal from Superior Court of Keokuk, Lee County.
HON. HENRY BANK, JR., Judge.

THURSDAY, OCTOBER 9, 1890.

ACTION to recover damages on account of a personal injury received by plaintiff while in the service of defendants. There was a trial by jury, and a verdict and judgment for plaintiff. The defendants appeal.

D. F. Miller, Sr., and *Casey & Stewart*, for appellants: The rule in this state is that an opinion does not disqualify if the juror believes he can render an impartial verdict according to the evidence. *State v. Hinkle*, 6 Iowa, 380; *State v. Munchrath*, 43 N. W. Rep. 213. A boss or foreman, who has no authority over his men except to direct them in their work is but a coemploye and not a vice-principal; and for the negligence of a boss or foreman the master is not responsible. *Peterson v. Coal & Mining Co.*, 50 Iowa, 673; *Houser v. Railway Co.*, 60 Iowa, 230; *Foley v. Railway Co.*, 64 Iowa, 656; and see *Murphy v. Smith*, 19 C. B. 361. The employer is not bound to employ the latest improvements in machinery. He is only bound to see that the machinery he does employ is reasonably safe and suitable; and it is only ordinary care for which an employer is responsible. *Greenleaf v. Railway Co.*, 29 Iowa, 14; *Hunt v. Railway Co.*, 26 Iowa, 364; *Burns v. Railway Co.*, 69 Iowa, 451, 455; *Hickey v. Taafe*, 12 N. E. Rep. (N. Y.) 286; *Allison Manuf. Co. v. McCormick*, 118 Pa. St. 519; 4 Am. St. Rep. 613; *Delaware, etc., Works v. Nuttall*, 13 Atl. Rep. 65. It is sufficient if a minor servant is informed of the danger in any way; it is not necessary that he be instructed by the master. *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 304; *Atlas Engine Works v. Randall*, 100 Ind. 273; 50 Am.

Rep. 798; *Fones v. Philips*, 39 Ark. 17; 43 Am. Rep. 265; *Ciriack v. Woolen Co.*, 146 Mass. 182; 4 Am. Rep. 307; *Hickey v. Taafe*, 12 N. E. Rep. (N. Y.) 286; *Way v. Railway Co.*, 40 Iowa, 343. Since *Coombs v. Cordage Co.*, 102 Mass., cited by appellee, the Massachusetts court has announced the contrary doctrine in *Ciriack v. Woolen Co.*, 146 Mass., and *Williams v. Churchill*, 137 Mass. If defects in the machinery used are known to the employe, or are discoverable by him in the exercise of ordinary care, and he remains in the employment without protest, and without inducement by promise that the defects shall be remedied, he will be presumed to have no objection to the defects, and cannot recover for injuries caused thereby. *Lemley v. Casewell*, 47 Iowa, 159; *Muldowney v. Railway Co.*, 39 Iowa, 615, and the authorities in the last-named case cited; *Kroy, Adm'x, v. Railway Co.*, 32 Iowa, 357. Appellee must be held to have assumed all the risks incidental to the employment. *Youll v. Railway Co.*, 66 Iowa, 346, 351; *Heath v. Whitebreast, etc., Co.*, 65 Iowa, 737, 740; *Moran v. Harris*, 63 Iowa, 390, 391; 2 Thompson on Neg. 977. If an employe is directed to do one character of work, and, of his own will and without any direction of his employer, engages in another kind of work, and while engaged in the other kind of work is injured, he cannot recover from the employer for such injury. *Gribble v. Sioux City*, 38 Iowa, 390. In such action the burden of proof is on the plaintiff, to establish that he, himself, was not negligent. *Muldowney v. Railway Co.*, 39 Iowa, 615; *Benson v. C. R. of Iowa*, 42 Iowa, 192; *Baird v. Murford*, 29 Iowa, 531. Contributory negligence on the part of a minor will defeat his recovery for an injury precisely as in the case of an adult. *Atlas Engine Works v. Randall, supra; Brazil, etc., Co. v. Cain*, 98 Ind. 282; *Brown v. Maxwell*, 6 Hill, 592; *Chicago, etc., Ry. Co. v. Patchin*, 16 Ill. 202; *Masser v. Railway Co.*, 68 Iowa, 605; *Nagle v. Railway Co.*, 88 Penn. St. 35; 32 Am. Rep. 35. On the facts, plaintiff was certainly guilty of contributory negligence; and we claim that, as matter of law, he was guilty of

contributory negligence. *Sedgwick v. Railway Co.*, 76 Iowa, 340; *Ways v. Railway Co.*, 76 Iowa, 393, 396; *Honegsberger v. Railway Co.*, 33 How. 199; *McGinnis v. Bridge Co.*, 49 Mich. 466; 8 Am. & Eng. R. R. Cases, 135. The opinion of the witnesses possessing peculiar skill is admissible whenever the subject-matter so far partakes of the nature of a science as to require a course of previous habit or study to attain to a knowledge of it. *Muldowney v. Railway Co.*, 36 Iowa, 462, 472; *Hamilton v. Railway Co.* and *Way v. Railway Co.*, 40 Iowa, 341, 346, are not in point. In the case at bar, the jury had before them only the model of appellant's machine. A machinist is competent to give an opinion as an expert in relation to the construction of machinery. *Sheldon v. Booth*, 50 Iowa, 209; *Huizega v. Cutler S. L. Co.*, 51 Mich. 272; *Scattergood v. Wood*, 79 N. Y. 263; 35 Am. Rep. 515, 517; *Chicago v. Greer*, 9 Wallace, 726, 733. The apparent intelligence and capacity of plaintiff was a proper subject for opinion evidence, even though non-expert. 7 Am. & Eng. Ency. of Law, 507; *Mills v. Winter*, 94 Ind. 329; *State v. Shelton*, 64 Iowa, 333; *Conn. Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612, 620; *McKee v. Nelson*, 4 Cowen, 355; 15 Am. Dec. 384; *Nagle v. Railway Co.*, 88 Penn. St. 35; 32 Am. Rep. 413, 416. The court erred in its statement of the issues to the jury. *Tuck v. Manuf. Co.*, 67 Iowa, 576, 580; *Gamble v. Mullin*, 74 Iowa, 99; *Kellow v. Railway Co.*, 68 Iowa, 470, 476. "It is improper for a court to place, by frequent repetitions, too prominently before a jury any principle of law involved in the case." 2 Thompson on Trials, sec. 2331; *Powell v. Messer*, 18 Tex. 401; Sackett on Instructions [2 Ed.] sec. 7, p. 15; *Ludwig v. Sager*, 84 Ill. 99; *Am. B. Soc. v. Price*, 115 Ill. 628. The instructions were long, tedious, prolix and calculated to bewilder and mislead a jury. *Haney v. Caldwell*, 43 Ark. 184; *Sadler v. Sadler*, 16 Ark. 628; *Merritt v. Merritt*, 20 Ill. 65, 80; *Roe v. Taylor*, 45 Ill. 485, 491; *Mosier v. Kitchell*, 87 Ill. 19; *Loeb v. Weis*, 64 Ind. 285. In view of the facts of the case at bar, the damages are

unreasonable and excessive. As nothing but compensatory damages were claimed, he was only entitled to actual damages. *Collins v. City of Council Bluffs*, 35 Iowa, 434; *Rose v. Railway Co.*, 39 Iowa, 246. When, therefore, it is manifest that the jury have given grossly beyond the rule of compensation, it becomes imperative duty of the court to arrest the excess. *Collins v. City of Council Bluffs*, 35 Iowa, 432; *Rose v. Railway Co.*, 39 Iowa, 246, 256; *Parsons v. Railway Co.*, 6 S. W. Rep. 464.

On rehearing: *First.* The court is mistaken in regard to the facts upon which the opinion is based. *Second.* The court failed to apply the law, in regard to the assumption of risks, to the facts proven and specially found by the jury. The evidence shows that neither defendant, Samuel Atlee, nor his foreman, McMurphy, gave defendant any orders to do what he was doing at the time of his injury. The rule as to the acceptance of risks should certainly be applied to this plaintiff. The general rule was not relaxed in favor of minors in the following cases: *Curran v. Manuf. Co.*, 130 Mass. 374; s. c., 39 Am. Rep. 457; *Sullivan v. Manuf. Co.*, 113 Mass. 396; *Probert v. Phipps*, 149 Mass. 258; 21 N. E. Rep. 370; *Coffey v. Chapal*, 2 N. Y. Sup.; *Oszkoscil v. Pencil Co.*, 6 N. Y. Sup. 501; *Crowley v. Pac. Mills*, 19 N. E. Rep. (Mass.) 344. Minor servants are held to assume the obvious risks of their service. *Smith v. Irwin*, 18 Atl. Rep. (N. J.) 853; *Beckham v. Hillier*, 47 N. J. Law, 14; *Foster v. Pusey*, 14 N. E. Rep. (Del.) 545; Note to the case of *Hickey v. Taafe*, in 26 Am. Law Reg. 734, where many of the leading cases upon this subject are reviewed.

James C. Davis, for appellee: The claim that contributory negligence as a matter of law existed as a defense was not made in the court below, and being raised for the first time in this court cannot be considered. See authorities in McClain's Digest, sec. 145,

p. 48. The defense of contributory negligence, when applied to adults, if the facts are at all in dispute, must be submitted to the jury. *Greenleaf v. Railway Co.*, 29 Ia. 36; *Greenleaf, Adm'r, v. Railway Co.*, 33 Ia. 53; *Whitsett v. Railway Co.*, 67 Ia. 159, sec. 7. In cases where personal injuries to a minor are involved the doctrine of contributory negligence only applies so far as the age, experience and intelligence of the minor will permit it. *McMillan v. Railway Co.*, 46 Ia. 233; *Benton v. Railway Co.*, 55 Ia. 501; *Baker v. Railway Co.*, 35 N. W. Rep. 838; *Kunz v. City of Troy*, 10 N. E. Rep. 445; *Walters v. Railway Co.*, 41 Ia. 75; *Mackey v. City of Vicksburg*, 2 S. R. 179; *Cassida v. Railway Co.*, 13 Pac. Rep. 441; *Muchlhausen v. Railway Co.*, 2 S. W. Rep. 315; *Huff v. Ames*, 19 N. W. Rep. 623. There was no error in excusing Richard Pritchett as a juror for cause. Code, sec. 2772, subdiv. 9; *City of Albia v. O'Hara*, 64 Ia. 298; *Wisehart v. Diez*, 67 Ia. 122. The refusal of the courts to permit Carter, a witness for defendant, to testify whether the defendant's machine was any more dangerous than the other kinds of guides was not erroneous. *Muldowney v. Railway Co.*, 36 Ia. 472; *Hamilton v. Railway Co.*, 36 Ia. 36; *Way v. Railway Co.*, 40 Ia. 346; *Barnes v. Newton*, 46 Ia. 569, sec. 3; *Spears v. Mt. Ayr*, 66 Ia. 724. An inquiry as to whether or not a witness is, according to the opinion of another witness, of "average" intelligence, or what he appeared to understand, is of too uncertain a character to be the subject of judicial inquiry. *Brown v. Railway Co.*, 69 Ia. 453, sec. 1, and cases cited. This court said in *Wilson v. McAdams*, 10 Ia. 590: "A party cannot, on the trial of a cause in the district court, consent to the exclusion of certain evidence and afterward predicate an exception and assignment of error on the order excluding it." See, also: *Parsons v. Hedges*, 15 Ia. 119; *Burns v. Oliphant*, 43 N. W. Rep. 289. In *Fuhs v. Oswiller*, 59 Ia. 432, it was held not to be error to omit from the instructions a special reference to an "amended" petition. *Gunsal v. McDonnel*, 67 Ia. 523. The instructions

given are identical or substantially the same as instructions asked by defendants, and defendants cannot assign the giving of them as error. *Smith v. Railway Co.*, 38 Ia. 174. The master permitted the boy to work in and about dangerous machinery for about three months without any warning or instructions of any kind whatever as to the dangers to be avoided. Under the unanimous decisions of the courts under such circumstances, a master cannot escape liability. Cooley on Torts, p. 553; Thompson on Negligence, p. 978; *Hill v. Gust*, 55 Ind. 48; *Coombs v. Cordage Co.*, 102 Mass. 573; *Dowling v. Gerard B. Allen Co.*, 74 Mo. 17; *Atkins v. Thread Co.*, 8 N. E. Rep. 241; *Louisville & Nashville Ry. Co. v. Fraley*, 9 N. E. Rep. 596; *Glover v. Manuf. Co.*, 18 N. E. Rep. 597; *Cleveland Rolling Mill Co. v. Corrigan*, 20 N. E. Rep. 466; *Nadan v. Lumber Co.*, 43 N. W. Rep. (Wis.) 1135. The master is liable for the tortious acts of his foreman, acting under authority. *Railway Co. v. Fort*, 17 Wall. 558; *Dowling v. Gerard B. Allen & Co.*, 74 Mo. 18; *Robertson v. Cornelson*, 34 Fed. Rep. 717; Cooley on Torts, p. 563; *Jones v. Cotton Mills*, 82 Va. 140; *Brazil Black Coal Co. v. Gaffery*, 22 N, E. Rep. ; *Benging v. Steinway*, 5 N. E. Rep. 449; *Moore v. Railway Co.*, 85 Mo. 593; *Clum v. Railway Co.*, 21 Mo. App. 218; *Sioux City & P. Ry. Co. v. Smith*, 36 N. W. Rep. 287; *C. & N. Ry. Co. v. Bayfield*, 37 Mich. 210; *Jones v. Mining Co.*, 28 N. W. Rep. 207; *Cook v. Railway Co.*, 24 N. W. Rep. 311. The damages are not excessive. In *Collins v. Council Bluffs*, 32 Ia. 331, this court sustained a verdict of fifteen thousand dollars for injury to hip. In *Depp v. Railway Co.*, 38 Ia. 597, a verdict for nine thousand dollars was sustained when the injury was to the thigh. In *Rice v. City of Des Moines*, 40 Ia. 639, a verdict for seventy-five hundred dollars was sustained when the injury was stiffness to the ankle joint. In *Finston v. Railway Co.*, 61 Ia. 463, when a bone in the leg of a man, fifty-two years old, was broken, resulting in a slight shortening of the limb, a verdict for eight thousand dollars was sustained.

Marion v. Railway Co., 64 Ia. 576. In *Knapp v. Railway Co.*, 71 Ia. 41, when the injury was only a partial disability of the right arm, a verdict for ninety-five hundred dollars was sustained. In *Salem v. Railway Co.*, 13 Nev. 106, a verdict for fifteen thousand dollars for loss of arm and broken ribs was sustained. In *Berger v. Railway Co.*, 50 Wis. 419, a verdict of eleven thousand dollars was sustained for loss of leg. In *Ketchum v. Railway Co.*, 38 La. Ann. 777, where a boy eleven years of age lost an arm, eleven thousand dollars was held not to be an excessive verdict. In *Galveston City Ry. Co. v. Hewett*, 3 S. W. Rep. 705, a verdict for seventy-five hundred dollars for personal injuries to an infant nineteen months old was sustained. In *Union Pac. Ry. Co. v. Lung*, 19 Kan. 488, for loss of hand at wrist, a verdict of ten thousand dollars was sustained. See also: *Robinson v. Railway Co.*, 48 Cal. 104; *Galveston Ry. Co. v. Porfert*, 10 S. W. Rep. 207; *Louisville & W. Ry. Co. v. Thompson*, 1 S. W. Rep. 840; *Gulf, C. & S. Ry. Co. v. Dorsey*, 66 Tex. 149; *Harrold v. Railway Co.*, 13 Daly, 378; *Graves v. Rochester*, 39 Hun (N. Y.) 5.

ROBINSON, J.—The defendants are copartners, under the firm-name of S. & J. C. Atlee; and at the time the injury in question was received they were engaged in operating a sawmill and lumber-yard at Fort Madison, employing in that business over two hundred men and boys. The plaintiff, Don D. Sprague, was thirteen years old on the twenty-second day of March, 1888; and, in the month of June of that year, he was employed by defendants to assist one Van Buskirk in running a saw. He continued in that employment until the eighth day of September, 1888, when he received an injury from the saw, which resulted in the amputation of his right hand at the wrist. The plaintiff claims that he was employed for the sole purpose of taking laths, pickets and binders from the machine after they were sawed, and assorting and piling them, and that such employment was without danger; that, at the time he was injured, he was

negligently ordered by defendants to run the saw; that it wsa dangerous; that plaintiff was without experience in running such machinery, and knew nothing about the danger incurred in running it; that the running of it was outside the scope of his employment; that the machinery was dangerous and defective in that the gauge to the saw had no safeguard to prevent injuries when it was changed and regulated; that the saw was unprotected; that defendants knew that plaintiff was not acquainted with the dangerous character of the machine, and that they negligently and wilfully failed to inform him how to use it, and of the dangers connected with its use. The defendants deny all liability on their part; deny that the machinery was defective; and deny that it was any more dangerous than any other machinery used for a similar purpose. They claim that, for many weeks prior to receiving the injury, plaintiff was familiar with the use and operation of the machine, and knew of all dangers connected therewith, and worked with it without objection, and of his own free will.

I. The appellants complain of the ruling of the court in sustaining an objection to William Pritchett as a juror. He was a member of the regular panel, and, while being examined as to his qualifications to act as a juror, stated that he had heard Mr. Atlee make a statement in regard to the merits of the controversy, and had formed an opinion, and that evidence would be required to change it; but he stated that he thought it would not influence him against a just verdict on the evidence. The objection to the juror was made on the grounds of challenge specified in subdivision 9 of section 2772 of the Code, which is as follows: "9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict."

1. MASTER and servant: jury: challenge for cause.

Upon the trial of challenges in civil as well as in criminal cases, other evidence than the testimony of the person challenged may be heard, and the court is

required to determine both the law and the fact involved in the challenge. Code, secs. 2773, 2774. It was the duty of the court to determine whether the opinion formed was an unqualified one on the merits of the controversy, or whether the state of mind of the juror appeared to be such as would preclude him from rendering a just verdict. The superior court was enabled to reach a conclusion as to his qualifications, not alone from the answers he gave, but from his appearance and general demeanor. While we should not have concluded that the ruling was wrong had the challenge been overruled, yet we cannot say that the juror was improperly rejected. Much of what was said in regard to challenges of jurors in *State v. Munchrath*, 43 N. W. Rep. 211, is applicable to the question under consideration.

II. The saw at which plaintiff was employed was set in a table about thirty-eight inches square, which was attached to a movable frame resting upon slides. On the table, at the right of the operator who controlled the saw, was a movable strip or bar of wood, used as a guide or gauge. Marks on the table parallel to and at different distances from the saw indicated the places at which the gauge should be set to saw laths, pickets and binders. It was usual in changing the gauge for the operator to move the end nearest to him to the proper mark with one hand, and adjust the further end by striking it with his other hand. The saw was partially covered by a small hood, which served in part to protect the hands of the operator from the saw. The saws commonly used did not have a diameter exceeding eleven or twelve inches; but, on the day preceding the accident, the plaintiff had been furnished a saw having a diameter of seventeen and one-half inches. An employe named Van Buskirk usually fed the saw, and it was the duty of plaintiff to take the material from the table as sawed; but he frequently fed the saw, and was so engaged, in the absence of Van Buskirk, on the day he was injured. He had been sawing binders, but, desiring to saw laths,

2. ——: negligence of coemploye: ratification: personal injury: contributory negligence.

he proceeded to move the gauge towards the saw, while it was in motion, in the manner described. The hood did not cover the part of the saw furthest from him; and, in striking the gauge next to that part of the saw, his right hand was caught by the saw, and injured in such a manner as to cause its amputation. It appears that the saw could have been put out of gear and stopped by moving the saw table a few inches on the slides, but that was not done. Appellants contend that plaintiff was familiar with the use of the saw, and knew all the dangers attending it; that he should not have attempted to set the gauge without first stopping the saw, and that he had been so instructed; that in feeding the saw he was out of the place for which he was employed; that he fed the saw voluntarily, without proper authority, and was negligent in attempting to set the gauge while the saw was in motion.

There is much conflict in the evidence as to most of these matters, but some of the evidence tends to show, and the jury were authorized to find, substantially as follows: The plaintiff was employed to assist Van Buskirk in running the saw. His duties required him to stand back of the saw, and take care of the material as sawed. He frequently changed work with Van Buskirk, and fed the saw. Occasionally he changed the gauge, but not often, as that was done by Van Buskirk, when he was present. Plaintiff received no instructions as to the proper manner of operating the saw and changing the gauge, excepting what he learned from Van Buskirk. He had not sufficient strength to move the table on the slides, and thus put the saw out of gear; and he was not large enough to see that part of the saw back of the hood when he was setting the gauge. He had been instructed by Van Buskirk to set the gauge without stopping the saw in the manner he adopted when injured. The foreman of the mill was Joseph Atlee. He sometimes employed hands, and had authority to change them from one kind of work to another. On the morning of the injury, one McMurphy was acting as foreman in the absence of Atlee. He sent Van Buskirk outside

the mill to work with a cart, and directed plaintiff to take charge of the saw, and sent an assistant to fill the place he usually occupied. He worked for a time, sawing laths, then set the gauge for binders, and sawed them for half an hour. He had been asked by McMurphy to saw pickets, but had said he could not. While sawing binders, one of the defendants went to him, and asked him why he did not saw pickets. Plaintiff told him he did not have time. The defendant in question, Sam Atlee, then told him to take the material for the pickets over to another employe, who was sawing pickets, which he did. Appellants insist that the plaintiff violated the orders given him by both McMurphy and Sam Atlee to saw pickets, and that, if he had obeyed such orders, there would have been no occasion to set the gauge so near the saw as to endanger his hand. But the evidence tends to show that, after plaintiff told Sam Atlee that he could not saw the pickets, his orders were changed, and he obeyed them. It thus appears that plaintiff was running the saw by authority of the foreman duly given, and that he was seen by one of the defendants while so engaged; that said defendant, in effect, ratified the orders of the foreman in directing him to run the saw; that plaintiff was injured while changing the gauge in the method he had been instructed to follow, and the only one which his size and strength permitted him to use.

III. Testimony was offered in regard to the machine with which plaintiff was injured, and a model of it was used on the trial. It was shown that, while such machines were used, their use was not general. Other gauges were more commonly used. One of them was in the form of three leaves on hinges, which could be turned backward and forward as needed to saw laths, pickets and binders, and, in setting the gauge, the hands of the operator were not nearer the saw than the outer edge of the table. Another was set by means of a screw; and in using that it was not necessary for the hand of the operator to be near the saw. Another was set by means

a. ——: defective machinery: evidence.

of a wheel, and others by other appliances; but in none of them was it necessary for the operator to have his hands near the saw while setting the gauge. After evidence of that character had been given, the defendants offered the testimony of an expert to the effect that the gauge used by them was as safe as any of the other gauges then in use; but, on the objection of plaintiff, the offered testimony was excluded. The model of defendants' machine was before the jury, and the different methods of using it had been fully explained. The purpose of the testimony was to show that the danger to the hands of the operator in setting the gauge of defendants was no greater than it was in setting other gauges then in use. Other dangers were not in question. With the model before them, and the fact shown that in using other gauges the hands of the operator were not brought near the saw, the jury were competent to determine the fact which the offered testimony was designed to disclose; and there was no error in rejecting it. *Way v. Illinois Cent. Ry. Co.*, 40 Iowa, 341; *Muldowney v. Illinois Cent. Ry. Co.*, 36 Iowa, 462; *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa, 31. See, also, *Nadau v. White River Lumber Co.*, 43 N. W. Rep. 1135.

4. THE same.

IV. McMurphy was examined as a witness for defendants. After testifying in regard to the directions he gave plaintiff on the morning of the injury, he was asked this question: "State how he appeared to you; whether a boy of average intelligence, or one of more than average intelligence, for one of his years." The question having been objected to by plaintiff, the defendants stated that they proposed to prove that plaintiff was a bright boy, of more than ordinary intelligence, and that he appeared to understand more about mill machinery than other boys many years his senior in age. The objection was sustained. Plaintiff had been examined and cross-examined in the presence of the jury, and they were as well qualified to form an opinion as to his intelligence as was the witness. The material question was not,

"What did he appear to understand?" but, "What was his capacity in fact?" We are of the opinion that the objection was properly sustained.

5. THE same.

V. Complaint is made of the ruling of the court in excluding an answer made by the witness Joseph Atlee to the effect that the gauge in question was "a common standard guide." The witness had previously given the same answer, and it was permitted to remain in the record. If there was error, it is evident that it was without prejudice.

6. THE same.

VI. A portion of the defense pleaded by defendants was set out in an amendment to their answer. In its formal statement of the issues, the superior court failed to refer to that portion of the defense set out in the amendment. Under ordinary circumstances, that would have constituted reversible error; but it appears that in this case the statement as made was submitted to the attorneys for defendants before it was given and approved by them. The amendment in question was filed on the third day of the trial, and the appellants insist that the statement may have been submitted, as aforesaid, before the amendment was filed. It is not usual for the court to prepare its charge at the beginning of the trial; and we cannot presume that it was prepared in this case before the issues were settled. Having approved the statement of the issues made to the jury, the defendants cannot now be heard to question it. Moreover the court, in fact, instructed the jury quite fully in various paragraphs of its charge in regard to the matters set out in the amendment, and appellants could not have been prejudiced by the omission of which they complain.

7. ——: instructions to jury.

VII. Appellants complain of the charge to the jury, and of certain instructions given at the request of plaintiff, for the reasons that they are lengthy, and make frequent reference to the age, intelligence, experience and judgment of plaintiff, and use a number of times such terms as "minority," "youth" and "inexperience." The issues

and facts disclosed by the evidence were so numerous and of such a nature as to require a longer charge than would be deemed necessary in most cases. The one given might perhaps have been shortened without disadvantage; but there is nothing to indicate that defendants were in any manner prejudiced by its length, and the references and terms objected to seem to have been used properly, and without too much repetition. The charge seems to have been prepared with much care, and, in the matters to which our attention has been called, submitted the case to the jury fairly, and as fully as was necessary.

VIII. The sufficiency of the evidence to sustain the verdict of the jury is discussed by counsel for appellant at great length, and in connection with different questions presented by the record. It is not necessary to mention each point discussed, nor to review the evidence more fully than we have already done. It was for the jury to determine from the evidence submitted whether the machine at which plaintiff was employed was dangerous; whether plaintiff was properly instructed in regard to using it, and was fully apprised of the danger involved in its use; whether he used due care, in view of his age, capacity and experience, in operating the machine; and whether defendants were negligent in not instructing him properly in regard to it in ordering him to do the work at which he was engaged when injured, and in not providing a safer machine. It is sufficient for us to say that we are of the opinion that the findings and verdict of the jury are sustained by the evidence. See *Nadau v. White River Lumber Co.*, 43 N. W. Rep. 1135.

IX. The amount of the verdict was seventy-five hundred dollars, and judgment was rendered therefor. Appellants insist that it is excessive. The amount seems large, when the wages paid for labor in mills of the kind in which plaintiff was engaged at the time of the accident are considered, but his expectation of life was then about forty-six years. The loss of his hand will necessarily

8. ——: negligence: damages.

close to him many kinds of lucrative employment. In view of these facts and others which the record suggests, we cannot say that the amount allowed is excessive. The judgment of the superior court is AFFIRMED.

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THE STATE OF IOWA, Appellee, v. JOEL. MCGEE, Appellant.

1. **Murder**: EVIDENCE: DEFENDANT'S REPUTATION. On a trial for murder, after a witness for defendant had testified that his reputation for being a quiet and peaceable citizen was good, it was error to allow him, on cross-examination, to be interrogated as to his participation in particular quarrels. (See *State v. Sterrett*, 71 Iowa, 386, and *State v. Gordon*, 3 Iowa, 410.) But, where the answers were all favorable to defendant, the error was no ground for complaint on his part.

2. ———: ———: CONSPIRACY: DECLARATIONS OF COCONSPIRATORS: FOUNDATION. On the trial of one of several defendants for murder, where it was claimed that the crime was the result of a conspiracy between them, *held*, that, before the declarations of a codefendant could be admitted in evidence, it must be shown *prima facie*, to the satisfaction of the judge, that a conspiracy in fact existed, although the question of its existence must finally be submitted to the jury.

3. **Criminal Evidence**: DECLARATIONS OF COCONSPIRATORS: WHEN ADMISSIBLE. It is not the rule that when a conspiracy is formed all admissions, acts and declarations of a coconspirator may be put in evidence against the others, but only such as are done or made in furtherance of their plans.

Appeal from Marion District Court. — HON. J. H. HENDERSON, Judge.

FRIDAY, OCTOBER 10, 1890.

INDICTMENT and verdict for murder in the first degree; and from a judgment of imprisonment for life the defendant appeals.

Hayes Bros., for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the State.

GRANGER, J.—The defendant on trial, Joel McGee, was jointly indicted with John McGee, Sr., John McGee, Jr., John Noe and David Cooper, for the murder of Noah Kelso on the thirty-first day of January, 1888. John McGee, Sr., owned a forty-acre tract of land lying south of, and adjoining, the farm of Noah Kelso, known as the "Hogland Forty." The forty was mainly timber with some slough or wild grass land, and on the north side of the tract was some hay belonging to McGee. On the thirty-first day of January, 1888, John McGee, with his sons, John and Joel, John Noe, William Pierce, John Williams and Monta Walters, with three teams, went to the Hogland Forty to draw hay. In the forenoon the hay was taken to Marysville, about one and one-half miles distant. At noon the parties all took dinner at McGee's. In the afternoon they returned to the forty; John McGee, Sr., and Joel each taking a gun,—Joel a double-barreled shotgun, and his father a rifle. The parties, except Joel and his father, went to the stacks to load the teams, and Joel and his father stopped in the timber to hunt. As the parties with the teams were on their way from the stacks, they discovered in the corn belonging to McGee, and on his premises, colts belonging to Kelso, and they stopped their teams and undertook to catch the colts. In this effort they came upon or discovered Bud Kelso, a son of Noah Kelso, who was with his team and sled on the Hogland Forty, as he "Bud" says, coming from his own land with wood, but, as others say, with a hay rack, boom-pole, axe and a chain, without any wood, and going south instead of north. Some harsh and threatening words were exchanged, as to which there is dispute, and Bud Kelso, with his team and the loose horses, went through a gap in the fence, which had been made by Bud Kelso

before he was seen by the McGees, onto the land of Noah Kelso. Bud Kelso drove home with his team, the horses were unharnessed, and Bud and his father each mounted a horse and rode towards the gap in the fence; Bud taking with him a large butcher-knife, and his father a loaded musket. Dan Kelso, another son of Noah, went on foot, as he says, and unarmed, but as to this there is a dispute, there being testimony that he carried a revolver. At or near the gap in the fence there was an altercation. Neither of the Kelsos, on the return, went onto the Hogland Forty. Some four or five shots were fired, and Noah Kelso was killed, and his body lay about one hundred and twenty-five yards north of the Hogland Forty on his own land. An examination disclosed seven gunshot wounds: One in the left arm, near the shoulder; one in the left lobe of the lungs; one in the breast; one in the back, passing through the left kidney; one near the *scrotum*, the ball being extracted from the hip; one on the right side, about the fourth rib, and one in the head, the ball entering the lower part of the left ear, and being extracted from the neck. It is not questioned in this court but that Kelso was killed by one of the McGees; that is, by the father, John McGee, Jr., or Joel. But it is earnestly contended that the fatal shot was not fired by Joel, and that he was not in any sense responsible or liable therefor. It is a practically undisputed fact in the case that Noah Kelso was a man who often threatened to use firearms, and did in some cases discharge them at or towards persons, but without effect, and that he was very quarrelsome. It also appears that the defendant was a quiet and peaceable citizen.

I. Lum Richmond was a witness for the defendant, and on his direct examination he said he had known the defendant for eight years, and that his reputation for being a quiet and peaceable citizen was good. On cross-examination he was asked as to his being engaged in particular quarrels, and against objection was allowed to answer. The ruling was wrong. *State v. Sterrett*,

1. MURDER: evidence: defendant's reputation.

71 Iowa, 386; *State v. Gordon*, 3 Iowa, 410. But the error is without prejudice, for the answers were in every instance favorable to the defendant.

II. A theory of the prosecution is that there was a conspiracy among the defendants, and on the trial it was permitted to prove the statements of David Cooper and George Burk made in defendant's absence. Two objections are urged against the admissibility of the testimony: *First*, that there was no such proof of a conspiracy as to render the admission of such statements competent, and, *second*, that the declarations are not such as are admissible when made by a coconspirator, conceding the existence of the conspiracy. The rule is as to a conspiracy, to justify such evidence, that the proof must show *prima facie*, in the opinion of the judge, its existence. 1 Greenl. Ev., sec. 111; Rosc. Crim. Ev. [7 Amer. Ed. 1874] secs. 417, 418; *State v. George*, 7 Ired. 321; *Card v. State*, 9 N. E. Rep. (Ind.) 591. The question of the sufficiency of such proof is one peculiarly for the determination of the trial court. *Card v. State*, *supra*. It should be borne in mind that the question of the actual existence of a conspiracy is one to be finally submitted to the jury, and that the finding or conclusion of the trial judge is only a basis for the admission of evidence. Without any intimation as to what the ultimate finding on that question should have been, we are of the opinion that the district court did not err in holding that the acts and declarations of the codefendants in the indictment could be admitted in evidence against the defendant on trial.

2. —: —: conspiracy: declarations of coconspirators: foundation.

III. We are next to inquire if the evidence admitted is such as is competent against a coconspirator on trial. Lot King was a witness for the state, and said he had a conversation with John McGee, Sr., on Sunday before the alleged murder, in the absence of Joel McGee, and stated as follows: "I am some acquainted with defendants.

3. CRIMINAL evidence: declarations of coconspirators: when admissible.

"*Q.* I will ask you whether or not you had any conversation with John McGee, Sr., about Sunday before the alleged killing of Kelso?" (Objected to because incompetent, not shown to be in the presence or hearing of defendant on trial, and at a different time from the date of the killing. Overruled. Defendant excepts.) "*A.* Well, sir, there was a conversation there where Cooper lived. He was finding fault about some hay that had been taken off the Hogland land. I was crawling about the house. Says I to him, 'Mr. McGee, if you make that hay on the Hogland pasture, you had better haul it right home, and not leave it there, and Kelso or no other person could steal it.' Then McGee says: 'He will not be here next winter, and don't you forget it.'"

The following, copied from the abstract, indicates a further ground of complaint: Vess Burk testifies:

"*Q.* I will ask you whether you had any conversation or talk with David Cooper at his house on Sunday, the twenty-ninth day of January, 1888. If so, tell what he said." (Objected to, because incompetent, not in the presence, or claimed to be in the presence or hearing, of defendant. Overruled. Defendant excepts.) "*A.* He said there were some men going to watch some hay that night, and if Kelso come there to the haystack, he would have to be packed off, or taken away, and he asked to borrow my gun. I believe he said there were twelve men going to watch the hay. Joel McGee was not there."

George Burk testified. (Same question asked as above. Same objection. Same ruling. Defendant excepts.) "*A.* He said Dave Cooper was talking about going to watch hay; said he intended to borrow a gun that evening, and if we heard an echo not to be surprised. He said there were twelve men."

Cross-examination: "Did not say what he meant by 'echo.'"

We particularly call attention to the testimony of King and Burk. King says that, after he had advised McGee to move the hay, so that neither Kelso nor any

other person could steal it, McGee said: "He will not be here next winter, and don't you forget it." The rule as to what statements of a coconspirator may be admitted in evidence is stated in the text-books, and in many adjudicated cases. Mr. Greenleaf says: "Every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them." 1 Greenl. Ev., sec. 111. *State v. Nash*, 7 Iowa, 346, approved the rule as given by Mr. Greenleaf. Other authorities, equally direct and certain, use such expressions as that the acts or statements must be "in the prosecution of the criminal conspiracy," or "in furtherance of the objects of the conspiracy." *People v. Stanley*, 47 Cal. 113; *State v. George, supra; Rex v. Hardy*, 24 State Tr. 199; 2 Starkie, Ev. [2 Ed.] 326; *Card v. State, supra; State v. Glidden*, 8 Atl. Rep. (Conn.) 890; *Spies v. People*, 12 N. E. Rep. (Ill.) 865; *Goins v. State*, 21 N. E. Rep. (Ohio) 476; *People v. Kerr*, 6 N. Y. Crim. 406, 674. The authorities are, so far as we are advised, in accord with the rule stated.

Is, then, the statement of John McGee, Sr., within the rule? It seems to us clearly not. The statement was not made in an attempt to further or prosecute the plans of the conspiracy. It was a statement made in a conversation with King, in which John McGee, Sr., had no purpose to aid or carry forward the designs of the confederacy. It is not the rule that, when a conspiracy is formed, all admissions, acts or declarations of a coconspirator may be put in evidence against the others, but only such as are in furtherance of their plans.

The statement of Cooper to George Burk, it seems to us, is of the same character. At the time of making the statement, Cooper was not engaged in the work of the conspiracy, and the remark was not to aid it. We have a fair illustration of the rule by referring to the testimony of the witness Vess Burk. Cooper was there

borrowing a gun to aid in the confederate plan, and the statement was made in that connection, and we think it was proper evidence.

The errors suggested were certainly prejudicial under the condition of the record. A theory of the defense is that the fatal shots, by whomsoever fired, were in self-defense, and the evidence is conflicting as to whether Kelso or one of the McGees fired the first shot. It is true that the Kelsos, knowing the McGees were at the gap in the fence armed, armed themselves and came there, and, after an altercation, the shots were fired. With a conflict as to who first fired, the inference to be drawn from the proven statements as to the contemplated use of guns, and that Kelso would not be there the next winter, would certainly have its influence with the jury in forming a conclusion. The arguments indicate no dispute as to resulting prejudice if the admission of the statements was error. The record presents no other question likely to arise on another trial that demands our attention. The judgment is REVERSED.

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WILLIAM S. SAMPLE *et ux.*, Appellees, v. W. B COLLINS, Executor, Appellant.

1. **Specific Performance**: DECREE: SATISFACTION: APPEAL. The decree rendered herein provided for the transfer of certain real and personal property by the defendant to the plaintiff. Upon the suggestion of the court, the defendant surrendered possession of the property in question, pending proceedings on appeal, to the plaintiff, for the purpose of reducing the amount of the *supersedeas* bond. *Held*, that there was not such a performance of the decree as to prevent an appeal.

2. ———: EVIDENCE. The plaintiffs, who are husband and wife, brought this action against the executor of the will of the husband's stepmother to secure the performance of an alleged parol agreement, made by the stepmother, during her lifetime, to convey to them certain real and personal property in consideration of

care and attention to be given to her person and estate. The evidence showed that such care and attention was given the deceased until her death, but it amounted to little more than what might reasonably be expected from plaintiffs in view of the relationship of the parties. The value of the property in question was above ten thousands of dollars, and there was no evidence of any express agreement for its conveyance. The deceased, however, had been infirm for several years prior to her death, during a part of the time being incapable of taking care of herself, and a number of times gave expression of her gratitude to plaintiffs for remaining with and caring for her, and of her intention to leave said property to them for a home upon her decease. *Held*, that the evidence failed to show an agreement to convey. [BECK, J., *dissenting*.]

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

FRIDAY, OCTOBER 10, 1890.

ACTION in equity to enforce an alleged verbal agreement to convey certain real estate, together with the furniture, etc., situated upon the same. The plaintiffs allege that, about ten years before her death, it was verbally agreed between them and Sarah M. Sample, deceased, that if plaintiff, William S. Sample, would remain in Keokuk with his family, and be near Sarah M. Sample when she needed any assistance, and would render her assistance in attending to her affairs, and nursing and caring for her when she was sick, she would provide for said William S. and Julia H. Sample upon her death; that Hugh W. Sample, the father of plaintiff William, and husband of Sarah M., departed this life March 31, 1869, leaving a last will, which was duly probated, whereby he gave to said Sarah M., his widow, a life-estate in the homestead, with remainder to William S. and S. S. Sample; that plaintiffs, without the payment of any consideration therefor, made a conveyance of said homestead to Sarah M. to enable her to have a fee-simple title, and to dispose of the same; that she thereafter sold said homestead for eleven thousand and five hundred dollars, and used part of the proceeds in purchasing the property in

question; that on the settlement of Hugh W. Sample's estate, when it was apparent that plaintiffs would receive nothing, Sarah M. Sample verbally promised and agreed with plaintiffs, in consideration of the conveyance to her of said homestead, and of the care, attention and assistance rendered, and to be rendered by nursing and caring for her while sick, and in attending to the purchase of property for her, and investment of money, she would convey the property in controversy, to-wit, lots 11 and 12, block 40, Keokuk, Iowa, with the furniture therein, to them, subject to a life-estate in herself; that, in pursuance of said agreement, they performed services in nursing, caring for and looking after the business of said Sarah M. Sample, and fully performed the agreement on their part; that no conveyance was ever delivered to them. Wherefore they pray an order of court conveying to them said lots 11 and 12, block 40, Keokuk, Iowa, with the furniture therein. The defendant answered admitting that Sarah M. Sample sold the homestead for eleven thousand, five hundred dollars; that she purchased the lots in question with a part of the proceeds, and used the same as her homestead to the time of her death, and that H. W. Sample was her husband; denies every other allegation of the petition; and alleges that the agreement set out is void because not in writing, and is barred by the statute of limitation. The defendant, by way of counterclaim, asks to recover three thousand dollars, paid by plaintiff on checks, and for twenty-five thousand, six hundred and fifty dollars, with interest, at ten per cent., as due on a contract of W. S. Sample to pay S. M. Sample ten thousand dollars of the stock of the National Bank of Keokuk, dated February 22, 1872. Plaintiff replied, denying the counterclaim, and alleging that the checks were drawn by S. M. Sample to get money out of the bank for her own use, which plaintiff drew and handed to her; that the check for two thousand dollars, July 20, 1887, was drawn to pay for lots 1, 2 and 3, block 102, purchased by her; that the check, November 9, 1882, for three hundred dollars,

was a gift to plaintiff; that the amount claimed on the bond is barred by the statute of limitation; that by the will of Sarah M. Sample the makers of said bonds were released. The court ordered the case transferred to the equity side of the docket, and tried as an equity case upon the specific performance of the contract alleged in the petition. The case was tried to the court, and a decree entered in favor of the plaintiff. The defendant appeals.

W. B. Collins, for appellant.

J. H. Anderson, for appellees.

GIVEN, J.—I. The appellees move to dismiss the appeal on the ground that the decree of the court was fully performed by appellant. It appears, by affidavits filed, that after the decision of the court had been announced, and the amount of the *supersedeas* bond was being considered, the judge suggested that, if the possession of the property was delivered over to plaintiffs' attorney, the amount would be five hundred dollars; whereupon the amount of the bond was fixed at five hundred dollars, and the plaintiffs were given possession of the property, but no conveyance was made. This was not such a performance of the decree as to prevent an appeal. It was simply a compromise by which to lessen the amount of the *supersedeas* bond necessary to indemnify the plaintiffs. The real estate which is the most important feature of the contention is still subject to the final decree that may be entered. The motion to dismiss the appeal is overruled.

1. SPECIFIC performance: decree: satisfaction: appeal.

II. We first inquire whether there was an agreement as alleged. There is no evidence of any negotiations or conversations between the plaintiffs and Mrs. Sample as to such an agreement, and nothing to show that such an agreement was made, except as it may be inferred from the relations and acts of the parties, and declarations of Mrs. Sample. Mrs.

2. ——: evidence.

Sample was stepmother of the plaintiff William, and until her death was upon intimate and friendly terms with him and his wife, Julia H. Sample. Mrs. Sample, deceased, was infirm for several years prior to her death, and for part of the time incapable of taking care of herself. The only evidence directly tending to show the care and attention given to her by the plaintiffs is that of Mrs. Diver, who testifies that they were there a good deal. "I saw them doing more than I was. She was their stepmother. I do not know that I saw them doing anything. She had a servant. They were there ready to do, and so was I." Also that of Mrs. Chittenden, who says that they cared for her to the last, about five years. They were there often. Mrs. Chittenden also testifies that Mrs. Sample spoke about the care and attention that William and his wife had given her, and of her dependence upon them for such care. She said that William had talked of going away, and that she felt that he had staid here on her account as much as anything else; that he had been everything to her, and done everything for her that it was possible for him to do. That at one time she offered to stay and assist her, and she said, "William and Julia will stay." About all the testimony as to William's attention to her business is that Mrs. Sample was in the habit of calling him to take her checks to the bank and get money for her. We do not understand from the testimony that he acted for her in any of the real-estate transactions mentioned. The agreement set out surely called for more attention to Mrs. Sample, and to her business, than is ordinarily given gratuitously by friends and relatives, and yet it is not shown that these plaintiffs rendered the deceased any more care, attention or service than might have been expected from them, in view of their relations. During all these years Mrs. Sample was attended by one and part of the time two servants, both of whom have testified, and could have stated as to plaintiffs' care and attention to deceased beyond that which appears, if such care and attention had been given. Surely the care and attention shown to have been

given not only fails to warrant an inference of agreement as alleged, but to show that such an agreement was performed.

The plaintiffs alleged, as part of the consideration for the promise to convey to them the lots in question, the conveyance by them of their interest in the homestead of H. W. Sample, deceased, without consideration. There is not only an entire absence of testimony to show such an agreement, but the written contract, in pursuance of which the homestead was conveyed, shows that it was upon consideration "of the just rights of dower of the said Sarah M. Sample in the estate of H. W. Sample, and that she does not oppose the probating of said will as written." It appears in testimony that on many occasions, when speaking about the plaintiffs and the property in question, Mrs. Sample, deceased, said that she intended it as a home for the plaintiffs when she was gone. Mr. Collier testifies: "Mrs. Sample told me that she had bought that property; that she felt that if she did not buy a home for Will he would not have one. * * * She wanted a place for a home for William. He had been good to her. She wanted to buy it for a home for him." H. W. Sample, son of plaintiffs, testified that one day his father was talking to his grandmother about building a house, and "she said: 'Never mind about that. Don't worry about that.' She did not expect to occupy the place long, and father should have it after she was through with it." To Mrs. Malcolm she said she wanted to buy the house so she could leave it to her son William for a home, that it was for a home for herself while she should live. Louise Hampton testifies that deceased said she thought she would get a home, and leave it to Mr. Sample's folks when she was through with it. Mrs. Hale testifies that Mrs. Sample frequently informed her of her intention to purchase a house for her own use during her life, and to leave it at her death to William, and gave as a reason that otherwise he would not have one; that her object in buying the house was to provide a home for William and his family after her death.

It will be observed that in these repeated statements of Mrs. Sample no mention is made of any agreement. She speaks of leaving the property so that it would go to plaintiffs at her death, because they had been kind to her, and would not otherwise have a home, but not because of any agreement. The plaintiffs ask specific performance of the parol contract, the existence of which is denied. We think the testimony fails to show that an agreement was made as alleged, and hence that the plaintiffs are not entitled to relief demanded.

III. We think defendant's counterclaim is sufficiently answered in the testimony, and certainly conclusively answered by the clause in Mrs. Sample's will, wherein she directs her executor to give to Samuel and W. S. Sample "acquittances and releases and receipts in full of all indebtedness and obligations to me, whether due or to become due, and the same shall be released and canceled."

Our conclusion is that the decree of the district court be reversed, and decree be entered dismissing the plaintiffs' petition, and with judgment that plaintiffs pay the costs. REVERSED.

BECK, J. (*dissenting*)—I. I cannot concur in the foregoing opinion of the majority of the court. I am clear in my conviction that the judgment of the district court ought to be affirmed. The evidence, in my opinion, clearly establishes facts authorizing the legal inference of an agreement between defendant's intestate and plaintiffs to the effect that she would secure to plaintiffs, by conveyance or by other assurance, the homestead occupied by her, to be possessed and enjoyed by plaintiffs after her death. The consideration of this contract moving from plaintiffs was their undertaking not to remove from Keokuk, and to give intestate such care and service as her condition of health and advancing age required, and to devote to her business such attention as it demanded. The evidence clearly shows that plaintiffs did perform these undertakings, and that intestate received the full measure of the consideration

of the contract. It is true that there is no evidence showing negotiations between the parties, a formal proposition made on one side and accepted by the other. No witnesses detail the conversation of the parties made in negotiations leading to the contract. There is no writing witnessing, and no formal calling of witnesses to hear, remember and testify to an oral agreement between the parties. Such proceedings and methods of attestation and proof of contracts are often, perhaps usually, had when strangers, or those having no close relations, deal with one another. But they are unusual, perhaps never had, when parent and child, having the fullest confidence and warmest affection for each other, have dealings of this kind with each other. The dutiful, tender and affectionate son would be shocked by a proposal to call a notary to attest, and witnesses to hear and remember, an agreement between him and his loving mother. The mother, ignorant of the forms and proceedings of business (one witness testifies that no one could be more so than intestate), would be equally shocked that one would doubt her intentions, and that she would fulfill her agreement. For these reasons, no doubt, the agreement between the parties was not evidenced by writing, and no witnesses were called to hear it. The lips of the plaintiffs are closed by the law.

This court holds that there is no evidence supporting the contract. In my opinion there is the clearest evidence, which is sufficient to convince the judicial mind to the degree of the most complete satisfaction that the agreement alleged in the petition was entered into between the parties, and fully performed by plaintiffs. That evidence is the clear, distinct and often-repeated statements and admissions of intestate. She, over and over again, declares her intention that the plaintiffs shall have the homestead she occupied, that they had remained in Keokuk to enable them to devote care and attention to her, and that they had served her, etc., etc., showing distinct admissions of obligation to secure the property to plaintiffs in consideration of

these services. Surely, upon this evidence, the law will infer what every reasonable man would believe, namely, that there was an arrangement between the parties to the effect that intestate should secure to them the homestead in consideration of these services to her.

II. The opinion plainly says that the evidence shows but limited attention and services of plaintiff to intestate which, inferentially, as I understand the opinion, is not sufficient to support a promise by intestate. Yet the opinion quotes evidence reciting the declarations of the intestate to the effect that she was dependent upon plaintiffs for care and attention, which they gave her; that Mr. Sample, on her account, remained in Keokuk; and "that he had been everything to her, and done everything for her that was possible for him to do." And yet the opinion puts depreciatory estimates upon plaintiffs' services and care of deceased. In my opinion, the evidence showing her declarations is the fullest possible proof of the great extent of plaintiff's services. She declares that they remained in Keokuk on her account, to render services to her, and, having remained, William, the plaintiff, "had been everything to her, and done everything for her that it was possible for him to do." Surely none knew better than she herself what services plaintiff had rendered to her. It surely was not the legal, moral or filial duty of plaintiffs to forbear to change their home, and to remove to another state or city in order to better their condition, and to remain in Keokuk presumptively to their financial disadvantage. There is clear evidence of services rendered by plaintiffs which constitute the consideration of the contract between the parties. The evidence shows that the relations between the decedent and Mr. Sample, plaintiff, were of the most tender and affectionate character. While she was a stepmother, neither could have been more affectionate and confiding as to the other had she been his natural mother. Doubtless she assumed the relation of stepmother when he was of such tender years that he

acquired for her all the affection of a son, and she for him all the affection of a mother.

III. Let it be supposed that the case presents these facts: Mr. Sample, through a course of years, supplied his stepmother, at her request, with money, amounting in the aggregate to many thousands of dollars, which was used by her to secure services and other things necessary for her comfort. These large advances were often acknowledged by her; accompanied by expressions of gratitude therefor, with frequent declarations that in return for them, and in discharge of the obligation imposed upon her for these advances, she intended to secure to him the homestead occupied by her. Such expressions were made to him, and to his family, and often to others. Under such a state of facts, can any one doubt that the law would infer a contract binding her to secure to him the homestead in the absence of equities therein held by others? Indeed, the consideration for the contract having been shown beyond question, and the frequent admission of the obligation arising from the receipt thereof being established by clear proof, the law will infer a contract entered into between the parties binding the intestate to secure to plaintiff the homestead. See *Wence v. Wykoff*, 52 Iowa, 644; *Van Sandt v. Cramer, Adm'r*, 60 Iowa, 424. We think no one would contend, where the consideration of the alleged contract was money paid, instead of services rendered, that the law would not infer a contract between the parties. But in this case plaintiffs, instead of advancing to intestate a few thousands of dollars, gave her care, attention and services for years, which, under the law, they were not bound to render, and which these relations did not impose upon them as a filial, moral or honorable obligation. These services and care were more valuable to intestate than money. They required greater sacrifice on the part of plaintiffs than the payment of thousands; for the performance of these services kept plaintiffs and their family in Keokuk, depriving them all of opportunities of seeking employment and fortune elsewhere, which is usually attained

by the intelligent and faithful. We are authorized to infer that plaintiffs are persons of that character. Surely the law will imply a contract under the facts of the case as readily as though it were shown that plaintiffs advanced to intestate money upon her request.

IV. In my opinion there can arise no reasonable doubt that deceased intended that plaintiffs should have the property. Such an intention is established by the plainest evidence. The law, on the facts and principles heretofore stated, will infer that there was an agreement between the parties, and the intention was pursuant thereto. But under the principles of equity which require courts to effectuate intentions, the law, in order to do so, will infer the existence of a contract when there are no conflicting equities. This will be done in the exercise of the power of equity to enforce rights based upon unexecuted intentions. If such intentions be purely voluntary, chancery can give no aid to compel the enforcement of such rights. But the existence of the intention being clearly shown, equity will, with acute and vigilant intelligence, seek for grounds on which the intention may be effectuated. It will find, in this case, evidence establishing inferentially the existence of an agreement. Justice demands that the contract be enforced, and thereby the intentions of intestate be effectuated. The duty of courts in such cases is forcibly expressed by Lord HOLT in *Fisher v. Wiggins*, 12 Mod. 297. In support of the doctrine he announces, he cites a rule announced seventy years before by Sir HENRY HOBART, chief justice of the court of common pleas, in *Earl of Clanrickard's Case*, Hob. 273. Lord HOLT uses this language: "Judges ought to be curious and astute to find a means to support the intent of parties, which often makes judges in constructions transpose clauses in deeds, and split an instant into priority and posteriority, and never adjudge without reluctancy against intent of parties, especially in intended provisions for children." Sir HENRY HOBART, in the case cited by Lord HOLT, makes this declaration: "I do

exceedingly commend the judges that are curious and almost subtile, astute (which is the word used in the proverbs of Solomon in a good sense, when it is to a good end) to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." It will be observed that the rule of these cases is intended to effectuate the intentions of parties, and thereby attain justice and defeat wrong and injury in the administration of the law: ends and purposes for which this court has its existence, and which I am sure it is always the pleasure of my brothers to endeavor to attain. The rule cannot be commended in language too strong. The attainment of justice and the prevention of wrong and injury is the aim and end of all adjudications of this court, and whatever stands in the way thereof must be brushed aside or overthrown, though it be forms and technicalities recognized by the law as controlling the practice in judicial proceedings. The obstacle in the way of recovery by plaintiffs in this case, as held by the majority of this court, is that they fail by direct evidence to establish clearly, as required by the technical rules of the law applicable to such cases, a contract formally entered into between them and the defendant's intestate, Mrs. Sample. This rule exists to effectuate justice, and defeat attempts to perpetrate wrong. It is intended to protect estates from fraudulent claims, based upon alleged contracts made upon supposititious considerations, in cases wherein neither contract nor consideration is established, and nothing appears to support the good faith and justice of the claims. It is not intended to defeat a claim when the consideration upon which it is based is shown beyond dispute, and where justice and right demand that it be enforced. Technical rules of this character, with forms of proceedings, constitute the vessel in which the cargo of justice is borne. If one or the other is to be lost, it must be the vessel. The precious cargo must be saved, though the hull that bears it must be abandoned in order to secure its preservation. These

doctrines lie at the very foundation of our system of jurisprudence and are as old as the common law. Lord HOLT's language, quoted from *Fisher v. Wiggins*, was used in 1693, and the decision of Sir HENRY HOBART in *Earl of Clanrickard's Case* was made in 1626. I am not informed that any court of England or the United States has ever doubted the doctrine of these cases. Surely it is not for the supreme court of Iowa, which is and ought to be at the head of all advances towards the correct administration of justice, to ignore the doctrines and rules intended to attain that end, which, in the cases we have cited, were first announced two hundred and sixty-four years ago. This court should rather uphold, extend and broaden the doctrines, if it be required in the perfect attainment of justice. But the foregoing opinion of the majority of this court, in my judgment, by failure to give force and effect to authorized legal inferences drawn from established facts, without any attempt "to be curious and astute to find means to support the intent of parties," defeats such intent. The contemplation of the effects of the decision of a majority of this court in the case is to me extremely painful. The deceased was possessed of considerable property which she acquired from the estate of Mr. Sample's father. The justice and generosity of himself and his brother, the only heirs, secured it to her without contest or dispute. He, it is inferable from the record, received little, if anything, from his father's estate. He is now a poor man, not owning a homestead. Through the decision of this court, the homestead, which his kind and loving stepmother intended to secure to him, is, by the defeat of her intentions, diverted to her distant relatives; for she had no children of her own, and the son of her husband from whom she obtained her property cannot obtain, under the decision of this court, the homestead she intended for him. I am forced to say that, as the law never intends such injustice, it ought not to be done by the decision of this court of equity. This court should, in the language of Lord HOLT, "be curious and astute to find a means

to support the intent" of the deceased in this case, and defeat the great injustice resulting from the decision of the majority announced in the foregoing opinion. In my judgment the judgment of the district court ought to be affirmed.

THE STATE OF IOWA, Appellee, v. LOU FOLEY, Appellant.

1. **Embezzlement**: EVIDENCE: PRACTICE. Where an indictment for embezzlement is based upon the e mployment of one as agent for the sale of certain personal property to a person named, proof, on the part of the state, of authority to sell to any person, is not such a variance as will support a motion for verdict in favor of the defendant.

2. ———: ———: ———. Such charge will be considered established where the evidence shows the receipt of the property in question by the accused as agent for the person named as principal, and that upon demand, at a time when the principal was entitled to an accounting, he failed and refused to account for the same.

3. ———: NEWLY-DISCOVERED EVIDENCE: NEW TRIAL. A party is not entitled to a new trial upon the ground of newly-discovered evidence where the facts upon which the motion therefor is based are of such a nature that they must have been known to him before trial, and it does not appear that the necessary diligence has been used to secure proof thereof, nor that any postponement of the trial on that account had been asked.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FRIDAY, OCTOBER 10, 1890.

ON October 10, 1889, the grand jury returned an indictment charging the defendant with the crime of larceny by embezzlement of two diamond eardrops, of the value of one hundred and fifty dollars, committed on the twenty-seventh day of September, 1889. This case was tried to a jury; and, at the conclusion of the testimony for the state, the defendant moved the court to instruct the jury to return a verdict of not guilty on

the grounds: *First*, that there was a fatal variance between the indictment and evidence as to the extent of defendant's agency; *second*, that the indictment does not show that the conversion of the diamonds was during the capacity of agent on the part of the defendant; *third*, that there has been no conversion shown; and, *fourth*, that the evidence was not sufficient to put the defendant upon his defense. This motion being overruled, and the case being fully submitted, the jury returned a verdict of "Guilty as charged." The defendant moved to set aside the verdict, and for a new trial, on the ground that the verdict is contrary to the evidence and the instructions, and on the further ground of newly-discovered evidence. This motion being overruled, judgment was pronounced upon the verdict. To all of which defendant excepted, and from which he appeals.

McHenry & McHenry, for appellant.

John Y. Stone, Attorney General, for the State.

GIVEN, J.—I. The employment or agency charged in the indictment was to sell the diamonds to J. R. Hurlbut. There was evidence tending to show such agency, and the fact that there was other evidence tending to show authority to sell to any person was not such a variance as to warrant the court in sustaining defendant's motion for verdict.

1. EMBEZZLEMENT: evidence: practice.

II. The indictment charges, and there was testimony tending to show, a conversion during the time that defendant was acting as agent for Kennedy. There was evidence on the part of the state showing that defendant had received the diamonds as agent for Kennedy, as charged; and that, upon demand, at the time when Kennedy was entitled to an accounting, the defendant had failed and refused to account for the same. Under the evidence adduced on behalf of the state there was no error in overruling defendant's motion for verdict, and in putting him upon his defense.

2. THE same.

III. The next question presented is, whether the court erred in overruling the defendant's motion to set aside the verdict, and for a new trial. The testimony shows without conflict that, on the twenty-seventh day of September, 1889, one G. W. Kennedy, of Chicago, a dealer in diamonds, was in the city of Des Moines, and met with the defendant Foley, who represented that he could sell a pair of diamond eardrops to one Hurlbut, whereupon Kennedy gave to Foley a pair of diamond eardrops of the value of one hundred and fifty dollars, under an agreement that Foley was to sell them to Hurlbut, for Kennedy, and to have, as compensation, all that he could get over one hundred and fifty dollars. It further appears that Foley failed to return the diamonds or their value to Kennedy, the owner, and, on demand, claimed that he had given them to another party for inspection, and that they had not been returned to him. It appears that Foley had previously sold similar articles for Kennedy. Frank Mathis testified that he was present when Kennedy asked Foley for some diamonds he had given him, and Foley said he had given them to some one to examine, and had not got them back yet, but would get them in the morning; that he (Mathis) then called Foley to one side, and asked him about the diamonds; that he said "he helped Kennedy put up a job, and never got anything out of him, and he said he had sold the diamonds, and had the stuff in his pocket for them, and was going to keep it." James Murphy, whom Mathis says was present, though examined as a witness, was not inquired of with respect to this conversation with Mathis. Defendant introduced some testimony tending to show that Kennedy authorized Foley to sell the eardrops to any person, and that if any person doubted his word about them to let them take the eardrops to a jeweler or expert.

8. ——: newly-discovered evidence: new trial.

In support of his motion on the grounds of newly-discovered evidence, the defendant filed the affidavit of one James Clark, who stated that he is a married man,

and resides in Des Moines; that on the twenty-seventh day of September, 1889, he received from defendant, on West Locust and Fifth streets, a box containing two diamond eardrops, for the purpose of having them examined as to their value; that he did not find anyone to consult as to their value that night, and that on that night he became intoxicated, and the next thing he knew he was in Davenport, from whence he went to Chicago and Milwaukee, continuing in a state of intoxication for six weeks, and did not return to Des Moines until December 11, 1889, which was after defendant's trial; that at Davenport he put the diamonds into his valise, and that they had either been lost or stolen. One Bradshaw made affidavit that he was a detective, and had made search for Clark, at the instance of the defendant, and Kennedy, the prosecuting witness, made affidavit that Clark had paid to him, through another, the value of the diamond eardrops.

Assuming Clark's statement to be true, it was clearly not newly-discovered evidence to the defendant. If it be true that he gave the diamonds to Clark, on Locust street, September 27, he certainly knew who Clark was, and that he had failed to return the diamonds to him, or to account for them. All that Clark could have testified to was known to the defendant at and before his trial, and yet it does not appear that he asked any postponement of the trial for the purpose of procuring Clark's testimony. Three witnesses testified to being with defendant on Locust street, Des Moines, in September, 1889, when a stranger, whom defendant called Clark, received a box containing diamonds from Foley. It is unnecessary that we state more particularly the testimony. Our conclusion is that it fully sustains the verdict; and that the verdict is in harmony with the evidence and the instruction given by the court. The testimony was not only not newly discovered, but diligence, such as the law requires, is not shown. The judgment of the district court should be AFFIRMED.

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THE STATE OF IOWA, Appellee, v. THOMAS SIPULT, Appellant.

1. **Criminal Evidence:** ALIBI: CONFLICT. The evidence on the defense of *alibi* in this case is considered, and *held* to be conflicting, and hence no reason for reversing a judgment of conviction on the ground that an *alibi* was proved.

2. ——: ——: DEGREE OF PROOF: INSTRUCTION. On the question of *alibi* the court was asked to instruct as follows: "You should indulge no prejudice against an *alibi* as a defense, for the reason that, if it is clearly established by intelligent and reliable witnesses, it is a legal and complete defense." *Held* that it was properly refused, because, *first*, it was not necessary to give the implied warning, and, *second*, it is not necessary to acquittal that an *alibi* be clearly established,—a preponderance of the evidence being sufficient.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

SATURDAY, OCTOBER 11, 1890.

THE defendant was convicted upon an indictment for robbery, and he appeals.

McHenry & McHenry, for appellant.

John Y. Stone, Attorney General and *Thos. A. Cheshire*, for the State.

ROTHROCK, C. J.—I. The charge made against the defendant is that he forcibly took from the person of one Jacob Garenta the sum of about twenty dollars. The alleged crime was committed in the city of Des Moines, on the night of the twenty-ninth of June, 1889. Garenta lived at the town of Indianola, and he stated in his testimony as a witness that he went to Des Moines to attend a circus; that he was not favorably impressed with the circus parade in the streets, and did not attend the performance in the tent, but visited several places of resort, and

1. CRIMINAL evidence: alibi: conflict.

drank more or less intoxicating liquors; that he met defendant in the evening, and that defendant invited him to go to a party; that they went east on an electric car to Sixteenth street, got off, and went to the Wabash railroad track; that he refused to go any further, and the defendant then assaulted him, knocked him down, and robbed him. Garenta went to the police headquarters and made complaint, and soon thereafter the defendant was arrested. The defense relied upon was that defendant was not the person who committed the crime; and, to sustain the defense, a number of witnesses were introduced and examined, who testified that the defendant was in another part of the city at the time that Garenta claimed he was robbed. As is usual in such cases, the witnesses were called upon to state the time when they saw defendant on the evening and night of the robbery, and everyone knows how uncertain and unreliable this class of evidence is, when based on mere recollection. Garenta had known the defendant for several years, and, so far as his testimony is concerned, he could not well be mistaken in the identity of the man; and he is corroborated by the testimony of one M. S. Harrahan, a street-railway conductor, who stated that, on the night of June 29, 1889, at about 9:45 P. M., the defendant and Garenta got on the car of which the witness was conductor, and rode to the end of the line, at Sixteenth street. We have stated enough of the evidence, in a general way, to show that there is a conflict upon the question as to whether the defendant committed the crime charged. It is strenuously contended in the argument of counsel for appellant that the verdict was contrary to the evidence. We have examined the facts in detail, and our conclusion is that we ought not to disturb the judgment on this ground.

II. Counsel for the defendant requested the court to instruct the jury as follows: "You should indulge in no prejudice against an *alibi* as a defense, for the reason that, if it is clearly established by intelligent and reliable witnesses, it is a legal and complete defense." The

2. ——: ——: degree of proof: instruction.

instruction was refused, and the refusal is claimed to be error. It was not necessary that the court should give the jury the warning implied in the instruction, and it was properly refused, because, as we think, it incorrectly stated the law applicable to the defense of *alibi*. It is not necessary to acquittal that an *alibi* should be clearly established. It is sufficient if it is established by a preponderance of evidence. *State v. Red*, 53 Iowa, 69; *State v. Hamilton*, 57 Iowa, 596; *State v. Maher*, 74 Iowa, 77; *State v. Reed*, 62 Iowa, 40; *State v. Rivers*, 68 Iowa, 611.

Objections are urged as to the correctness of some of the instructions given by the court to the jury. We think the instructions are correct. They are, in the main, such as have frequently been approved by this court. The one most seriously objected to is very nearly in the same language as an instruction which was held not to be erroneous in *State v. Maher*, *supra*. The judgment of the district court is AFFIRMED.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Appellee, v. BROWN *et al.*, Appellants.

[Two Cases.]

Execution: SALE OF SEVERAL TRACTS EN MASSE: SETTING ASIDE APPEAL. Where lands have been offered upon execution sale in separate tracts, pursuant to the requirements of notices given to the sheriff by defendant, as contemplated by section 3088 of the Code, and no bids are received, a sale *en masse* is not *per se* void or voidable, though the several tracts are not contiguous. And where defendant appeals from the overruling of a motion to set such sale aside, and the abstract fails to show what evidence was presented to the court below in support of the motion, this court must presume that there was no evidence requiring the motion to be sustained.

Appeal from Cass District Court.—HON. H. E. DEEMER, Judge.

SATURDAY, OCTOBER 11, 1890.

THE defendants made separate motions to set aside separate sales of land upon two executions, each issued upon a different decree of foreclosure. The motions in the court below were each overruled. Defendants appeal in each case. The cases are presented together in this court. The parties in each case are the same.

H. G. Curtis, for appellants.

Phelps & Temple, for appellee.

BECK, J.—I. The abstract before us contains each execution, with the levy and return, showing on each a sale of the property *en masse*, after having been offered for sale, without bids, in separate tracts pursuant to the requirements of notices given to the sheriff by the defendants, as contemplated by Code, section 3088. It appears that the land described in the first execution consists of two contiguous "forties" in different sections, and the land set out in the other consists of two hundred and forty acres in different sections, but all contiguous, and two contiguous "forties" three-fourths of a mile from the other tract. The abstract contains no evidence or showing in any form as to the character of the lands, whether they are used as one or more farms, and whether the land would sell for a better price *en masse*, or separately. There is not one word of evidence on this point. It is not shown that there was not such evidence given to the court below showing facts authorizing a sale *en masse*. If there was no evidence upon the subject, it will be presumed that the execution defendant failed to show prejudice. It is not shown in the abstract that it contains all the evidence.

II. It is very plain that Code, section 3088, does not prohibit sales *en masse*, after the execution defendants have required sales in separate tracts, and the land is so offered, and cannot be sold. If it were otherwise, sales might, in some cases be prevented, and injustice done thereby. The section is intended to

secure sales in separate tracts, as defendants in execution shall direct. It is not intended to defeat sales. A reasonable construction must be put on it, to the effect that, if the lands cannot be sold in separate tracts, for want of bidders, they may be afterwards offered and sold *en masse*, and such a sale is not *per se* void or voidable. If the entire tract, or the different tracts, for any reason, are more valuable when taken together, and will in that way sell for a larger sum, they may be so sold, and the sale will be subject to no objection by the land-owner. The fact that no bids were made when the land was offered in separate tracts, and it was, therefore, sold *en masse*, raises a presumption that the land is more valuable when taken together, or, at least, that defendant in execution suffered no prejudice by the sale. *Lamb v. McConkey*, 76 Iowa, 47; *Hill v. Baker*, 32 Iowa, 302; *Burmeister v. Dewey*, 27 Iowa, 468; *Cunningham v. Felker*, 26 Iowa, 118. The cases cited by defendants' counsel (*Williams v. Allison*, 33 Iowa, 278, and *Taylor v. Trulock*, 59 Iowa, 558) are not in conflict with the views we have expressed. The case just named involved the sale of numerous town lots, and it was not shown, nor could it be presumed, that they were used together for any purpose. The other case demands no further attention. It will readily be seen that the facts set out in the record show no grounds for reversing the ruling of the court below; and, in the absence of any showing of facts which in law would require the sale to be set aside, we shall presume that the facts before the court, when the abstract is silent as to them, required the sale to be upheld.

These considerations dispose of the case. The judgment of the district court is AFFIRMED.

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A. A. MOORE, Appellee, v. THE MARSHALLTOWN OPERA-HOUSE COMPANY *et al.*, Appellants.

1. **Execution: LEVY ON CORPORATION STOCK: METHOD.** Under sections 2967 (subd. 3) and 3050 of the Code, an execution can be levied upon stocks in a corporation only by notifying the president, or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been levied upon; and such notice must be in writing. Mere oral notice, with a writing upon the back of the stub of the certificates in the stock book, is not sufficient.

2. ——: ——: **PRIOR TRANSFER: SUFFICIENCY.** Under section 1078 of the Code, which provides that a transfer of shares in a corporation is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, *held* that an entry by the secretary of the company, in the stock book, that the shares had been assigned as collateral security, was sufficient to defeat a subsequent levy of an execution upon them by the creditors of the assignor.

Appeal from Marshall District Court.—HON. JOHN L. STEVENS, Judge.

SATURDAY, OCTOBER 11, 1890.

THIS action involves the question as to the rightful ownership of two and one-half shares of the capital stock of the Marshalltown Opera-House Company. The plaintiff claims to be the owner thereof by virtue of a purchase at sheriff's sale on an execution against one F. J. Peterson; and the defendant, the First National Bank of Marshalltown, claims said stock as collateral security for a debt owing by said Peterson to said bank. The opera-house company is a corporation; and the plaintiff, by this action, claims that he is entitled to a decree declaring his right to the stock superior to the claim of the bank, and an order requiring the opera-house company to transfer said stock to him on the books of the corporation. A decree was entered for the plaintiff, and defendants appeal.

Binford & Snelling, for appellants.

J. M. Whittaker, for appellee.

ROTHROCK, C. J.—The cause was submitted to the court below upon an agreed statement of facts, from which it appears that F. J. Peterson was the owner of two and one-half shares of the capital stock of the Marshalltown Opera-House Company. He borrowed one hundred and twenty-five dollars of the First National Bank of Marshalltown, and duly assigned his certificates of stock to the bank as collateral security for the money borrowed. The plaintiff Moore was the owner of a judgment against Peterson, upon which judgment he caused an execution to be issued to the sheriff of Marshall county. The execution was placed in the hands of a deputy sheriff for service. The cashier of the bank was also secretary of the opera-house company. On the thirty-first day of October, the deputy sheriff went to the bank and requested the secretary of the company to give him the stock book of said company. The secretary pointed to where it was, and the deputy took the book, and turned to the stub in the book from which the certificate of Peterson had been detached, and then and there verbally notified the secretary "that the stock is levied on" by virtue of the execution in his hands; and the secretary, in reply, verbally notified the said officer that the stock of Peterson had been transferred to the bank as collateral security. Thereupon, the secretary, at the request of said officer, wrote in said book, and on the back of the stub from which Peterson's certificate had been detached, the following words: "Levied on October 31, 1888, by virtue of an execution in favor of A. A. Moore against F. J. Peterson, district court of Marshall county, Iowa." To this writing, the deputy sheriff, in the presence of the secretary, affixed the following signature: "J. S. Hixon, Sheriff, by H. D. East, Deputy." While writing said indorsement on the stub, the president of the bank exhibited the certificate of stock to

1. EXECUTION: levy on corporation stock: method.

said deputy, and the assignment thereof by said Peterson, and told said deputy that said stock was still held by said bank as collateral security. The stock book did not then show that said stock had been transferred to any one by Peterson. On the next day, the secretary made an entry on the stock book showing that the said stock had been assigned to the bank as collateral security. Afterwards, and on the same day, the sheriff served written notices of the levy upon the bank and upon Peterson, and the bank gave the sheriff written notice that said stock was the property of the bank as collateral security.

It is provided by section 1078 of the Code that a transfer of shares in a corporation is not valid, except as between the parties thereto, until it is regularly entered on the books of the company. In *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, it was held that a transfer of corporation stock is not valid as against an attaching creditor of the assignor without notice, unless the transfer is entered on the books of the company, as provided by section 1078 of the Code. Stocks or interest owned by a defendant in a corporation may be levied upon under an execution in the same manner as provided for attaching the same. Code, sec. 3050. Subdivision 3 of section 2967 provides that "stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached." Until the notice required by this provision of the law is given, no valid levy can be said to be made. The stock in such cases is not capable of manual delivery. It cannot be seized and taken into the possession of the sheriff, and the law designates the notice to the president or other officer of the corporation as the levy. When the notice has been given, the levy is made, and it cannot be said to be a levy until it is given. It can have no force as a levy without the notice; and this notice implies more than a mere verbal declaration of the officer holding the writ. It should be a notice in writing. In *Mooar v. Walker*, 46 Iowa, 164, it is said:

"In order to obtain a lien on stock in an incorporated company, and prevent a valid transfer of the same, the creditor must follow the mode pointed out in the third subdivision of said section 2967, which requires that notice shall be served on the president, or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock had been attached." While it is true that it was not necessary to determine in that case that the notice should be in writing, yet that part of the opinion above quoted serves to show how this court then understood that a levy upon stocks should be made. And while in common parlance the word "notify" or "notifying," may sometimes mean a mere verbal communication, yet, when applied to an official act, we think it can have no other meaning than that it should be in writing. The deputy sheriff, in attempting to make the levy, evidently did not have the statute prescribing the form of levy in mind. It appears to us that he was of opinion that he ought in some way to seize Peterson's stock by examining the books and noting a levy thereon. On the next day, he took the necessary steps to make a levy by serving the notice required by law; but, before this was done, the stock was transferred to the bank on the books of the company, and the right of the bank as assignee of the stock was complete. It is claimed in argument that the transfer on the books of the company was not in form a compliance with the law providing for a transfer. It appears to us that it was sufficiently formal so far as to preclude an execution creditor from afterwards acquiring rights as against the assignee. In our opinion the plaintiff acquired no rights as against the bank by the alleged levy; and the decree of the district court is REVERSED.

2. —:—: prior transfer: sufficiency.

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THE STATE OF IOWA, Appellee, v. H. J. ILLSLEY, Appellant.

1. **Liquor Nuisance:** EVIDENCE OF LIQUORS FOUND AT ANOTHER PLACE. Upon an indictment for keeping a saloon nuisance, after a witness had given testimony tending to show that liquors were kept and sold by defendant at the place named, it was proper to allow him to testify to finding five barrels of bottled beer at the residence of defendant's father, with whom defendant resided, in another part of the city.

2. **Appeal:** INSTRUCTION NOT SET OUT IN RECORD. This court cannot pass upon the correctness of an instruction not set out in the record.

3. **Instructions:** SPECIFIC DEFENSES. When the instructions given are correct, and fairly cover all the defenses pleaded, the defendant cannot complain that they were not more specific as to a particular defense, where he has failed to ask for such specific instruction.

4. **Liquor Nuisance:** EVIDENCE OF ILLEGAL SALES: PRESUMPTION: INSTRUCTION. In a prosecution for liquor nuisance, the court instructed that the finding of intoxicating liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling-house which does not include, or is not used in connection with, a tavern, public eating-house, restaurant, grocery, or other places of public resort, is presumptive evidence that such liquors were kept for illegal sale, and that proof of actual sale is presumptive evidence of illegal sale. *Held*, not subject to the objection that it does not state the law in clear and concise language.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

SATURDAY, OCTOBER 11, 1890.

INDICTMENT for maintaining a saloon nuisance. Verdict of guilty, and judgment, from which defendant appeals.

McHenry & McHenry, for appellant.

John Y. Stone, Attorney General, for the State.

GRANGER, J.—George Hansen was a witness for the state, and testified that the defendant kept a bakery and eating-house on corner of Sixth and Locust streets, Des Moines, and gave evidence strongly tending to show that intoxicating liquors were kept there for sale, and sold there. The defendant resided with his father on Ninth and Pleasant streets, and the witness was allowed to testify that he searched these premises, and found there five barrels of bottled beer. Of the admission of this evidence the defendant complains. Its admission was right. It afforded a fair inference, when unexplained, that it was a base of supplies for the saloon, and, judging from the record of the case, it undoubtedly was.

1. LIQUOR NUISANCE: evidence of liquors found at another place.

II. Appellant says he asked the usual instruction that verbal statements and admissions should be received with care, caution, etc., and complains that it was not given; but the instruction is not set out in the record, and without it we cannot say that it correctly stated the law.

2. APPEAL: instruction not set out in record.

III. Appellant says "he could not deny, for he could not know, that intoxicating liquors were sold in his place. But he testified and contended that, if they were sold, it was without his knowledge or consent;" and he urges, as to this, his principal defense, he was entitled to have "the law clearly and unmistakably stated." It is true the court has not especially called attention to this as a defense, and there is nothing in the record to indicate that reliance was principally based on such facts. The instructions of the court leave no doubt that the jury, to convict, must find that the defendant alone, or in connection with others, "established the business of keeping for sale, and selling, intoxicating liquors." The instructions are utterly inconsistent with the idea of his being guilty of maintaining a nuisance that he had no knowledge of. If appellant wanted more, it is certainly not a bad rule that would require him to ask it.

3. INSTRUCTIONS: specific defenses.

IV. The court said to the jury as follows: "It is also provided that in all actions, prosecutions and proceedings, under the law of this state, prohibiting the illegal manufacture and sale of intoxicating liquors, the finding of such liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling-house which does not include, or is not used in connection with, a tavern, public eating-house, restaurant, grocery, or other places of public resort, shall be presumptive evidence that such liquors were kept for illegal sale, and proof of actual sale shall be presumptive evidence of illegal sale." Appellant complains that the instruction does not "state the law in plain and concise language in such manner that the jury would clearly understand it." We think, as applied to the testimony, that any person of ordinary understanding could understand the instruction. It is a correct statement of law and applicable; and our statements and references in the former division of this opinion apply to the neglect to present to the court an instruction embodying appellant's wishes. The judgment is AFFIRMED.

4. LIQUOR NUISANCE: EVIDENCE OF ILLEGAL SALES: PRESUMPTION: INSTRUCTION.

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G. W. PITTS, Appellee, v. M. E. LEWIS *et al.*, Appellants.

1. **Tax Title**: APPEAL: RECORD. A stipulation between parties to a cause, during the trial thereof, that certain evidence may be received and used in such action so far as the same may be relevant, will not make such evidence a part of the record when it is neither offered nor used in fact upon the trial.

2. ———: EVIDENCE. After the cause was submitted, and was held under advisement, the court permitted the defendants, on notice to the plaintiff, to file affidavits of parties who had testified upon the trial, that the originals of certain deeds, of which certified copies had been offered in evidence, were not in their possession or control. *Held*, that the reception of the affidavits was a matter resting in the discretion of the court, and no abuse of discretion was shown.

3. ——— : VALIDITY : ATTACK. Where, in a contest over the title to real estate, the respective parties claim under different tax deeds, and there is neither allegation nor proof of the payment of taxes by either party, and neither has demurred to the pleading of the other, both parties will be deemed to have waived all question on this subject.

4. ——— : ——— : PLEADING. An allegation of ownership under a tax deed by one party to a cause, and a general denial by the opposite party, puts in issue every question as to the validity of such deed that is open to investigation.

5. ——— : ——— : ORGANIZATION OF COUNTIES : JUDICIAL NOTICE. Courts will take judicial notice of the organization of counties within the state.

6. ——— : ———. A tax deed issued by a county in pursuance of an unauthorized sale of land for taxes owing another county is void.

Appeal from Sioux District Court.—HON. C. H. LEWIS, Judge.

SATURDAY, OCTOBER 11, 1890.

ACTION by equitable proceeding to quiet the title to certain land in the plaintiff, as against the defendants, M. E. Lewis, C. A. Dodge, Austin Corbin and Henry Kamp. The plaintiff claims ownership and title under a tax deed from the treasurer of Sioux county to F. M. Hubbell, executed March 12, 1864, upon a sale made November 6, 1860, Hubbell having conveyed said land to Franklin Keeney, who thereafter conveyed the same to the plaintiff. The defendants deny that plaintiff is owner of said land, and allege that the same was sold on August 3, 1868, by the treasurer of said county, for delinquent taxes, to one William H. Gurley, and that on February 16, 1872, a treasurer's deed was executed to one Aleck Johnson, to whom Gurley had assigned his certificate; that on July 5, 1872, said Johnson conveyed to Austin Corbin, who conveyed to M. E. Lewis and C. A. Dodge, who thereafter conveyed said land to the defendant Kamp, who still owns and is in possession of the same. Defendants allege that more than five years have elapsed since the execution of said tax deed, and

prior to the commencement of this suit, and that, by reason thereof the plaintiff was, when he commenced this suit, barred of his right to recover said land. The plaintiff, in reply, denies that there was a sale to Gurley; that a tax deed was executed and recorded; that the treasurer of said county had any authority to sell said premises on the third day of August, 1868; and alleges that the adjournment of the sale was for more than two months; that there was no assessment or levy of taxes on said land for either of the years 1860 to 1866, inclusive; that there was no board of supervisors or assessor for said county, authorized to act; that no delinquent taxes were brought forward on the tax list of 1866, or prior years; and that more than five years have elapsed since the execution and recording of the tax deed under which plaintiff claims; by reason whereof, defendants are barred from asserting any claim adverse to plaintiff. The case being fully submitted, decree was entered in favor of plaintiff, granting the relief prayed for. Defendants appeal.

Struble & Stiger, for appellants.

Pitts & Kessey, for appellee.

GIVEN, J.—I. Question is made whether we have before us all the evidence offered on the trial below. In certifying the case certain documentary evidence used on the trial was set forth in the transcript by copy, the original documents not being on file in the clerk's office. In obedience to a rule of this court upon the clerk, he recently sent up certain documents in original form, which, we think, are sufficiently identified as the same documents used in evidence on the trial. On the trial it was stipulated "that the evidence taken in the case of E. S. Ellsworth *v.* E. W. Ross *et al.* may be used in this action as far as the same relates to the tax deed in controversy." No part of that testimony is included in the record in this case. The stipulation does not of itself make that evidence, or any

1. TAX title: appeal: record.

part of it, evidence in this case. It provides that it may be used, but it does not appear that either party availed himself of that privilege. Surely it is not the province of this court to now select from the record in that case evidence, however pertinent to this, not shown to have been offered and used on the trial. We think the record before us contains, in proper form, all evidence offered on the trial of this case.

II. On the trial, the defendant introduced certified copies of certain deeds for the purpose of showing the title in the defendant Kamp. After the case was submitted, and while held under advisement, the defendants, on notice to plaintiff, were permitted, over plaintiff's objection, to file the affidavits of defendants Kamp, Lewis and Dodge, to the effect that they did not have the original deeds, of which copies had been offered, in their possession or control. It was shown by counter-affidavit that Lewis and Dodge were present, and testified on the trial, and that Kamp was but a few miles distant at the time. It is conceded that it was within the discretion of the court whether to receive these affidavits; but it is contended that to receive them under the circumstances was an abuse of that discretion. We do not discover that any prejudice resulted from the action of the court, nor that there is any abuse of discretion.

2. ——: evidence.

III. Each party claims under tax deed, and disputes the right of the other to question the validity of the deed under which he claims. If the deed under which plaintiff claims is valid, then he had title to the land at the time of the tax sale under which defendants claim, as such deed not only conveys the interests of the owner of the patent title, but also of the state and county. Such title, however, may be divested by a subsequent tax sale and deed. If the tax deed under which defendants claim title is valid, then they may question the validity of plaintiff's title, because their title was obtained from the state after the sale under which plaintiff claims. To determine the rights of either to question the title of the other, we

3. ——: validity: attack.

must determine the validity of his title. A condition upon which a party may question a tax deed executed in conformity with section 897 of the Code is upon showing that he, or those under whom he claims, have paid all taxes due upon the property. There is neither allegation nor proof of the payment of taxes by either party; and, as neither has demurred to the pleading of the other, they will be taken as having waived all question on this subject. See *Adams v. Burdick*, 68 Iowa, 666, and *Adams v. Snow*, 65 Iowa, 436.

IV. Appellants contend that the tax deed under which plaintiff claims is void, because the taxes for which the sale was made were due to Woodbury county, and not to Sioux county. Appellee contends that no such issue is tendered in the pleadings. Appellee alleges ownership under the tax deed to Hubbell; and defendants deny generally, and thereby put in issue every question as to validity of that deed that is open to investigation.

4. —: —: pleading.

V. It is argued that the court cannot take judicial notice of the organization of Sioux county, and that there is no evidence of its organization. If courts may not take judicial notice of the organization of the counties of the state, then the fact of such organization must be established in each case to show jurisdiction. *Hard v. City of Decorah*, 43 Iowa, 313, is relied upon. In that case it was held that courts would not take judicial notice of the incorporation of towns and villages under the general incorporation act. Following the statement that the courts will take judicial notice of the general incorporation acts, the court says: "But the fact that a particular village or town has availed itself of the provision of these statutes, and become incorporated as they authorize, is private in its character. The character of county organizations, and their relations to the state and its courts, are not private, but such as of necessity must be judicially noticed and recognized by the courts. As bearing more or less directly upon this subject, see *McGill v. State*, 25 Tex. App. 499; *Evans v. Kilby*, 7

5. —: —: organization of counties: judicial notice.

S. E. Rep. (Ga.) 226; *Kansas City, F. S. & G. Ry. Co. v. Burge*, 40 Kan. 736; 21 Pac. Rep. 589; *Com. v. Fitzpatrick*, 15 Atl. Rep. (Pa.) 466; *State v. Glasgow*, 2 Am. Dec. 629; *County of Rock Island v. Steele*, 31 Ill. 453; *Gooding v. Morgan*, 70 Ill. 275; *People v. Robinson*, 17 Cal. 363; *People v. Telford*, 23 N. W. Rep. 213. By section 41, chapter 9, Acts, Third General Assembly, Sioux county was created, and by section 14, chapter 16, Acts, Fourth General Assembly, was attached to Wahkaw county (the name of which was afterwards changed to Woodbury county), for judicial, election and revenue purposes. Mr. E. E. Campbell, called and examined by the plaintiff, testified, on redirect examination, and without objection, that Sioux county was first organized February 15, 1860. This testimony being admitted without objection, and unquestioned in the record, we accept it as a fact proven that Sioux county became a separate and independent organization from Woodbury county, February, 1860.

VI. We have the fact of the organization of Sioux county in February, 1860, before us not only as a matter of which we will take judicial notice, but as a matter established by direct evidence. The case, therefore, is identical in its facts with that of *Hilliard v. Griffin*, 72 Iowa, 331, and, following that case, we hold that Sioux county had no authority to sell to Hubbell, and that the deed executed in pursuance of that sale is void. It follows from this conclusion that the plaintiff is not entitled to the relief demanded, and that his petition should be dismissed. This view of the case renders it unnecessary that we consider the other questions discussed. REVERSED.

6. —:—

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E. S. ELLSWORTH, Appellee, v. L. B. NELSON *et al.*, Appellants, and N. KESSEY, Intervenor, Appellee.

1. **Tax Title: DEED: DESCRIPTION.** A tax deed describing the property conveyed as the "undivided twenty acres, the southeast quarter of the southwest quarter of section ten," etc., is void for uncertainty.

2. **———: VALIDITY: ORGANIZATION OF COUNTY: JUDICIAL NOTICE.** A tax deed issued by a county in pursuance of a sale of land for taxes due another county is void; and courts will take judicial notice of the time of the organization of such counties with respect to such sale.

Appeal from Sioux District Court.—HON. H. C. LEWIS, Judge.

SATURDAY, OCTOBER 11, 1890.

ACTION to quiet title in certain real estate. The plaintiff claims title to the undivided half of the south half of the southwest quarter of section ten, township ninety-six, range forty-six, Sioux county, by virtue of a tax deed executed to him by the treasurer of said county on the second day of January, 1883, upon sale of said land for delinquent taxes, made December 1, 1879, which deed was duly acknowledged January 6, 1883, and filed for record on the same day. Intervenor Kessey claims title to the south half of said southwest quarter, under a deed executed by said treasurer to William Frame, December 14, 1865, filed for record January 3, 1866, upon a sale made November 14, 1860, for the delinquent taxes of 1858 and 1859. The defendant Bell claims title to an undivided half of said south half of said southwest quarter, under a treasurer's deed executed October 10, 1871, on a sale to William Gurley, made August 3, 1868, for the taxes of 1866. Appellant Nelson claims to hold and own the patent title to the south half of said southwest quarter, as grantee of

appellant Miller. Decree was entered in favor of the plaintiff Ellsworth, as to the undivided half of the south half of said southwest quarter, and quieting his title as against the defendants Bell, Nelson and Miller. Decree was also entered in favor of intervenor Kessey, against said Nelson, Bell and Miller as to the southeast quarter of said southwest quarter. Defendants Nelson and Miller appealed.

G. R. Struble, for appellants.

Burk & Hewitt, for appellee Ellsworth.

Pitts & Kessey, for appellee Kessey.

GIVEN, J.—I. We first inquire as to the objections urged against the plaintiff's tax title. Among other objections urged by intervenor Kessey is that the deed is void for uncertainty of description as to the land sold. The deed is for the "undivided twenty acres, the southeast quarter of the southwest quarter of section ten," etc., and the "undivided twenty acres, the southwest quarter of the southwest quarter of section ten," etc., from which we understand it was intended to convey an undivided twenty acres of said southeast quarter of the southwest quarter. In *Poindexter v. Doolittle*, 54 Iowa, 52, the deed recites that the northeast quarter of the southeast quarter of section five, township ninety-nine, range fourteen, was exposed to public sale for taxes for the year 1872; and, N. B. Doolittle having offered to pay the taxes for fourteen acres of the land, the same was struck off to him. This deed was held void for uncertainty in description. In *Griffith v. Utley*, 76 Iowa, 292, the description was: "The undivided thirty-nine and one-half acres of the northeast quarter," etc. It was held that "this description is not sufficient to identify the land intended to be sold and conveyed for taxes," and that the tax deed and other proceedings were void for uncertainty. See *Roberts v. Deeds*, 57

1. TAX title: deed: description.

Iowa, 320. Following these cases, we hold that the tax deed to plaintiff is void for uncertainty in the description of the lands intended to be conveyed. We need not notice the other objections urged against this deed.

II. We next inquire as to the tax deed to William Frame under which intervenor Kessey claims title. The sale upon which this deed is based was made on November 14, 1860, by the treasurer of Sioux county, for the delinquent taxes for the years 1858 and 1859. Appellants question the validity of this deed, upon the grounds, among others, that the taxes of 1858 and 1859 were not due to Sioux county, but to Woodbury county. In *Hilliard v. Griffin*, 72 Iowa, 331, it was held that taxes assessed and levied against land in O'Brien county while that county was attached to Woodbury county, for revenue and other purposes, belonged to Woodbury county, and that O'Brien county had no authority to sell and convey the same for such taxes. Question is made whether courts may take judicial notice of the organization of counties within the state, and the time of their organization. There is no testimony whatever in this case as to the organization of Sioux county; nor is it claimed that the testimony on that subject in the case of *Pitts v. Lewis*, *ante*, p. 51, is to be considered in this case. We held in that case that courts will take judicial notice of the organization of counties, and that Sioux county was organized in February, 1860. It follows from that conclusion, and the rule laid down in *Hilliard v. Griffin*, *supra*, that the taxes for 1858 and 1859, for which the land was sold to William Frame, belonged to Woodbury county, and not to Sioux county; and, consequently, the sale was void, and intervenor Kessey has no title under the deed issued thereon.

2. ——: validity: organization of county: judicial notice.

III. The decree of the district court being against the defendant Bell, and he not having joined in the appeal, it is unnecessary that we consider the question

raised as to the validity of the tax deed, under which he claims title.

Our conclusions are that the petitions of plaintiff and of the intervenor Kessey should be dismissed; that judgment be entered against them for costs; and that the title be quieted in the defendant, L. B. Nelson, as against all the parties to the action. REVERSED.

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THE STATE OF IOWA, Appellee, v. E. W. CONABLE, Appellant.

1. **Libel: INDICTMENT: CHANGE OF VENUE.** The defendant, an editor of a newspaper, was indicted upon a charge of criminal libel, based upon articles published in his paper, during a political campaign, charging a political opponent, who was a member of congress, and a candidate for re-election, with gross misconduct in office. An application for a change of the place of trial to a county outside of the congressional district, upon the ground of prejudice, based upon the facts above stated and the further facts, that all of the counties in the district were "largely democratic," the political party of the subject of the alleged libel, and that juries in those counties would be apt to be made up chiefly, if not wholly, from members of that party, was overruled by the district court. *Held*, no error; that the allegation in the defendant's petition, that the several counties in the district were "largely democratic" warranted the inference, in the absence of a showing to the contrary, that the political contest in the district was not sufficiently close to cause general bitterness or excitement as a result of the publication of the alleged libelous matter.

2. ———: ———: JUSTIFICATION: PLEADING. Where, in an indictment for libel, the libelous matter therein alleged to have been published by the defendant is sufficient to constitute the offense, it is not necessary that the indictment negative facts which are mere matters of defense.

3. ———: EVIDENCE: CONTEMPORANEOUS PUBLICATIONS. Upon a trial under an indictment for libel based upon a specific portion of an article published during a political campaign concerning a candidate for office, the balance of such article and other disparaging articles published by the defendant during the same campaign, and concerning the same candidate, though not of a libelous nature, may be given in evidence by the state, if, taken in connection with the alleged libel, they will assist in determining the motive with which the publication was made.

4. ——: ——. The libelous matter, upon which the indictment was based in this case charged a candidate for office with an agreement to sell an appointment to an office supposed to be under his control if elected, but the other party to the agreement was not named in the indictment. *Held*, that the person subsequently receiving such appointment, upon the recommendation of such candidate, although not the person with whom the defendant had charged the agreement had been made, might be permitted to testify upon the trial that he never gave, nor offered to give, anything to secure the appointment, as tending to show that the charge contained in the alleged libel was untrue.

5. ——: ——: CONTENTS OF LOST LETTER. After proof of the loss of a letter received by the defendant, in company with an affidavit to the facts charged in the alleged libelous article, the defendant proposed to show the contents of such letter to be, that the writer had investigated the case, and was satisfied that the facts set out in the affidavit were true, but there was no ruling upon the offer of such proof, nor any effort to introduce the evidence after making the offer. *Held*, that, while the defendant would have been entitled to prove the contents of the letter as stated, no error could be predicated upon the refusal of the district court to admit secondary evidence of such letter before defendant's statement of what he expected to prove thereby.

6. ——: ——: MALICE. Upon cross-examination the defendant was asked if he had not formerly supported the subject of the alleged libel for office; also, whether he had not solicited his support for a particular office; to both of which questions the defendant objected as being incompetent and immaterial. *Held*, that, as defendant's publication of the libel may have been prompted through disappointment in not receiving the coveted office, proof of the facts sought to be elicited was proper as tending to show malice on the part of the defendant.

7. ——: VERDICT: SUFFICIENCY OF EVIDENCE. While the evidence in this case as to probable cause and good faith is such that the jury might well have found the alleged libelous article privileged within the rule heretofore announced by this court, and the evidence tends to show that the defendant believed the same to be true, yet the evidence being conflicting upon the question of the motive of the defendant in making such publication, the court cannot say that in finding the defendant guilty, as charged, the jury abused the discretion which the law gives them.

Appeal from Clinton District Court.—HON. W. F. BRANNON, Judge.

SATURDAY, OCTOBER 11, 1890.

THE defendant was convicted of the crime of libel, and was adjudged to pay a fine of fifty dollars and costs. From that judgment he appeals.

Walsh & Sutton and *P. B. Wolfe*, for appellant.

John Y. Stone, Attorney General, *A. R. McCoy*, County Attorney, and *L. A. Ellis*, for the State.

ROBINSON, J.—The indictment on which defendant was tried and convicted is as follows: "The grand jury of the county of Clinton, in the name and by the authority of the state of Iowa, accuse E. W. Conable of the crime of libel, committed as follows: The said E. W. Conable, on the third day of November, A. D. 1888, in the county aforesaid, being a person of an envious, vicious, evil and wicked mind, and wickedly, maliciously and unlawfully contriving and intending as much as in him lay to injure, oppress and vilify the good name, fame, credit and reputation of Walter I. Hayes, a citizen of the state of Iowa, and at that time, and now, a member of the fiftieth congress of the United States of America for the second congressional district of the state of Iowa, and at that time a candidate for re-election as a member of the fifty-first congress of the United States from said district, and to bring him into contempt, infamy and public hatred, and to deprive him of the benefits of public confidence, and to defame, asperse, scandalize and vilify the character of said Walter I. Hayes, and to insinuate and cause it to be believed that the said Walter I. Hayes had been guilty of gross misconduct in his said office of member of congress as aforesaid, and that he had, as such congressman, corruptly received money, or attempted so to receive it, in consideration of recommending some person for appointment as postmaster at Wilton, in said congressional district, and that he was thereby an unfit person to be re-elected to said office, did unlawfully and maliciously, wickedly and scandalously, compose, write, print and publish, and did cause and procure to be composed, written, printed

and published in a certain so-called public newspaper entitled the *Clinton Morning News* a certain false, wicked, mischievous, and scandalous libel of and concerning the said Walter I. Hayes, and of and concerning his administration of the duties of his said office, while in the performance thereof, which said wicked, malicious, scurrilous, false, mischievous and scandalous libel contained the following, to the terms following:

"'THE ATTEMPTED SALE OF THE WILTON POSTOFFICE.'

"'A great deal of discussion has been indulged in of late, through the second district, and especially in Muscatine county, regarding an alleged attempt on the part of Congressman Hayes [meaning Walter I. Hayes] to sell the Wilton, Muscatine county, postoffice for five hundred dollars. It is claimed there are several witnesses to the transaction, and no doubt there are [meaning there were witnesses to a transaction in which said Walter I. Hayes attempted to corruptly sell the position of postmaster at Wilton, in said congressional district]; but for fear that an exposure would have a damaging effect on the Muscatine, democratic county ticket, those who hold the proofs of guilt [meaning guilt upon the part of said Walter I. Hayes in selling or attempting to sell the postoffice at Wilton], in the shape of correspondence, etc., are reticent about giving the evidence to the public. But the facts are generally known, and are the subject of universal comment among Muscatine citizens. It is not at all strange that Hayes should traffic in matters of this kind. It would not be because he possessed any conscientious scruples against doing such a thing that he would refrain, but simply for fear of being found out. In the case at hand, however, he seems to have given little thought as to consequences, trusting, no doubt, to his ability to bulldoze the thing through. The five hundred dollars once in his pocket [meaning that said Walter I. Hayes had received or attempted to obtain five hundred dollars for a sale of the postmastership of said Wilton], then he would trust to luck for means wherewith to deceive the people.

That there are dozens of men in Muscatine county who have seen evidence that would convict Hayes of attempting to sell the Wilton postoffice, there is not a shadow of doubt. [Meaning that said Walter I. Hayes had actually in fact attempted to sell the postmastership of said Wilton.] Voters of the second district, is this [meaning said Walter I. Hayes] the sort of men you want to represent you in congress? Is it creditable to you, democrats, to assume the responsibility of placing so corrupt an official [meaning said Walter I. Hayes] in a high office of honor and trust? Can you afford to let the stigma rest on you of sending such a man [meaning said Walter I. Hayes] to congress, knowing that he is wholly unworthy, and has grossly betrayed the confidence you have reposed in him? [Meaning that said Walter I. Hayes had, as a member of congress, as aforesaid, grossly betrayed his position, and corruptly sold, or attempted to sell, the postmastership at said Wilton.] Can you afford to do this? Look at the matter squarely in the face, and then ask yourselves if you can afford to do that which would reflect discredit and dishonor on each one of you, individually, who casts a vote for Walter I. Hayes for congressman. We have more faith in the integrity of the great majority that compose the democratic party of the second district than to think for a moment that that majority desires to be represented by political corruptionists and traffickers in the confidences of the people and the spoils of office. [Meaning that said Walter I. Hayes was politically corrupt as a member of congress, a trafficker in office.] Gentlemen, it is for you, for you, to say, on Tuesday next, whether you desire an honest or a dishonest man to represent you in congress.'

"And the grand jury aforesaid, upon their oath, do further present that, at the time the said E. W. Conable so wrote, printed and published the said false, scurrilous, scandalous and malicious, defamatory libel, the same was false, against the form of the statute in such case made and provided, and against the peace and dignity of the state of Iowa."

It is shown that the matter quoted in the indictment was written by defendant, and printed and published by defendant as alleged, and that, at the time of publication, Walter I. Hayes was a member of congress from the second district, and was a candidate for re-election. The verdict of the jury was in words as follows: "We, the jury, find the defendant guilty; and we also unanimously recommend him, the defendant, to the charitable consideration of the court."

I. The defendant pleaded not guilty to the indictment, and, on the twenty-first day of January, 1889, filed a petition, supported by affidavits, for a change of the place of trial to some county outside the second congressional district. The grounds for the change, as stated in the petition, were substantially as follows: That the alleged libel was written and published during the political canvass for the election of congressman from the second district; that Hayes was a candidate for re-election on the democratic ticket, and that his competitor was a republican; that the matter charged to be libelous was published from time to time during the campaign, and was of a political nature; that Clinton county, and all other counties of the second district, were largely democratic, and that, owing to the prejudice and excitement against him in these counties, he did not believe that he could obtain a fair and impartial trial therein. The petition was supported by the affidavits of forty-one persons, and was resisted by the counter-affidavits of forty-four persons, which alleged, in substance, that there was no excitement in Clinton county in regard to the suit, and no prejudice which would prevent, in the slightest degree, a fair and impartial trial of the defendant, and that, so far as there was any feeling, it was in favor of such a trial. On the showing thus made the petition was overruled, and of that action defendant now complains.

1. LIBEL: indictment: change of venue.

It was the duty of the district court, in the exercise of a sound discretion, to decide the matter of the petition, when fully advised, according to the very right of

it. Code, sec. 4374. The fact that a large majority in each of the counties comprising the second congressional district were of the same political party as Congressman Hayes, and that, as a consequence, the juries in Clinton and other counties would be apt to be made up chiefly if not wholly from members of that party, would not entitle defendant to a change of the place of trial. Had it been shown that great political excitement was caused, and much party bitterness engendered, by the campaign, and that these had not passed away at the time the application was made, such facts might well have been considered by the court in ruling upon the petition. A partisan inflamed with the excitement and prejudices of a closely contested political campaign, and influenced by a strong desire that the principles and candidates of his party shall be vindicated, could scarcely be expected to judge the political acts of a political opponent with the fairness and impartiality which justice and the law demand. Even though he sincerely desired to do exact justice, he might be easily, though unconsciously, influenced in his decision by the passions and desires of those about him. It would be most unjust to require a person to submit to a trial for a *quasi* political offense at the hands of political opponents, under the circumstances suggested. But, in this case, it was not shown that the contest for congressman was either close or exciting. The petition shows that the several counties of the second district were "largely democratic," and we are justified in inferring, in the absence of a showing to the contrary, that the contest was not sufficiently close to cause general bitterness or excitement. There is no showing that the discretion which is lodged in the district court was abused by denying the application for a change of the place of trial.

II. After the ruling on the petition, the defendant withdrew his plea of not guilty, and filed a demurrer to the indictment in words as follows: "Comes now said defendant and demurs to the indictment for the following reasons: *First.*

2. ——: ——: justification: pleading.

Said indictment shows on its face that the article therein contained is a privileged communication, and it nowhere alleges that the said defendant did not believe the same to be true, or that he had no reasonable grounds for believing the same to be true. That said indictment states no crime as charged. *Second.* That said pretended indictment shows on its face that the entire article is not contained therein as published, and that the remaining portions of said article, so omitted in said pretended indictment, are qualifying to the part so alleged, the entire article showing upon its face, when taken as a whole, not to be libelous." The demurrer was overruled.

The appellant contends that the matter set out in the indictment, and alleged to be libelous, was privileged, and, in order to make out a case, it was necessary for the state to allege that the matter was false, and that defendant did not, and had no reasonable cause to, believe it to be true. The indictment charges that the matter in question was false, and that it was written and published by defendant maliciously, wilfully and for an unlawful purpose. If the matter was privileged as claimed, that was a matter of defense which the defendant was entitled to prove. If the averments of the indictment are true, then defendant is guilty of the crime charged, unless, by reason of exceptional circumstances, he was justified in composing and publishing the alleged libel. But, as a general rule, it is not necessary, even in the case of statutory exceptions, for the indictment to show that the accused does not come within the provisions of the exception. Wharton, Crim. Pl. & Pr., sec. 238; 10 Amer. & Eng. Encyclopedia Law, 578; *State v. Stapp*, 29 Iowa, 551. Nor does the indictment show on its face that the alleged libel is privileged matter. If it had been true in fact, the defendant would not have been authorized to publish it for that reason alone. It must have been published with good motives and for justifiable ends. Code, sec. 4099. The indictment charges that the motives were bad, and the ends desired to be accomplished unlawful.

The second ground of the demurrer does not seem to be relied upon by defendant, and is not well founded. In our opinion the ruling on the demurrer was correct.

III. The court permitted the state to introduce in evidence the entire article from which the extract set out in the indictment was taken. It also permitted the introduction in evidence of other articles published by the defendant at various times during the campaign of the year 1888. We think they were properly admitted in evidence as bearing upon the question of malice on the part of defendant. They spoke disparagingly of Congressman Hayes and of his candidacy, and, considered alone, may not have been libelous, or even improper, but, taken in connection with the alleged libel, they indicate a feeling on the part of the defendant which might aid the jury in determining his real motives in pursuing the course he did. It was for the jury to determine their value.

8. —: evidence: contemporaneous publications.

IV. Appellant complains of the ruling of the court in permitting the person who was appointed postmaster at Wilton on the recommendation of Congressman Hayes to testify in substance and effect that he never gave, nor offered to give, anything to secure the appointment. It is said, that the person who so testified was not the person who was the party to the alleged corrupt agreement to secure the place. But the indictment does not show who that party was, and the testimony was proper to show that the charge contained in the alleged libel was untrue.

4. —: —.

V. Before the defendant published the article complained of he received information from various sources, which, he claims, led him to believe that the charges of improper and corrupt conduct made in the article were true. With the information so received was an affidavit made by a resident of Muscatine county in regard to the alleged sale of the Wilton office. It purported to give some of the facts connected with the transaction, and tended to show

5. —: —: contents of lost letter.

that portions at least of the alleged libel were true. The affidavit was received with a letter from Gen. Saunders of Davenport. After proving the loss of the letter, the defendant was asked if he could tell its contents. An objection to the question as incompetent and immaterial was sustained, and to that ruling the defendant excepted. He then "proposed to show that the contents of the note were, that they had investigated the case, and were satisfied that the facts, as set out in the affidavit, were true, and asked the defendant to publish the affidavit." There was no ruling on the offer, and no further question was asked by defendant. After stating the facts which he expected to prove, we think defendant would have been entitled to show the contents of the letter, had he insisted upon it, as tending to show that he acted with due caution and in good faith. But he did not seek to produce the evidence after making the offer. Moreover, the writer of the letter afterwards testified that he sent the affidavit to defendant for publication, if he thought it proper to publish it; that, although he could not repeat the contents of the letter, he could recall that he submitted it to defendant's judgment, and said, in effect, that the facts had been investigated to some extent, and that the affidavit was the result of the investigation. The defendant thus had the benefit of that which he offered to prove. It was not given as fully as he might have stated it, but it was the same in substance and effect.

VI. The defendant was asked if he did not support Judge Hayes in his first candidacy for congress, and, his objection to the question having been overruled, he answered: "I did. I was not familiar with his political methods then." The defendant was then asked if he had not requested Judge Hayes, at the close of his first campaign for congress, to recommend him for the position of collector of internal revenue for his district. The defendant and Judge Hayes belonged to the same political party, and it seems to have been the theory of the state that the hostility of defendant to the re-election of Judge Hayes

6. —: —: malice.

was due, in part at least, to the failure to secure his recommendation for the place named, and that it was not due to his desire to prevent the election of a corrupt candidate. We think the questions were proper as tending to establish the theory specified. The facts they sought to elicit were proper to be considered as to the alleged malice of defendant. If his course was prompted by disappointment in not receiving a coveted office, it was proper for the jury to know it. The defendant insists that he was not really a candidate for the place named, and that his failure to get it had nothing whatever to do with the course he subsequently pursued. It was for the jury to determine the truth of the matter.

VII. The appellant insists that the verdict is not supported by the evidence. It is alleged that the corrupt agreement for the sale of the Wilton office was made with a man named Mahanna, who was to pay five hundred dollars to one Johnson, and that the latter had a corrupt agreement with Hayes in regard to the matter. Mahanna was an applicant for the office of postmaster at Wilton. Johnson was a local politician of some influence. Mahanna claims that he was to pay Johnson five hundred dollars to secure the appointment, and that Johnson said that he was not to have the money,. Johnson admits that there was talk about a payment of five hundred dollars to secure the office, and that he made known the offer to Hayes; but he claims that Mahanna had said he would give five hundred dollars rather than see a rival named Ross appointed. Hayes admits that he knew there was some understanding in regard to the office between Mahanna and Johnson, but claims that he did not know what it was, and was not interested in it. He also further claims that Mahanna spoke to him about the matter, stating that Johnson had offered to secure the appointment for five hundred dollars, and suggesting that there might be a division of the amount with him; that he thereupon recommended the appointment of Ross, who was subsequently appointed.

7. —: verdict: sufficiency of evidence.

That there were improper negotiations in regard to the office in question is clear, but the connection of Congressman Hayes with the matter is not so apparent. There is much evidence tending to show that defendant acted with reasonable caution to ascertain the truth of the charge before he published it, and that he believed it to be true. The evidence as to probable cause and good faith was such that the jury might well have found the article in question privileged within the rule heretofore announced by this court. *Bays v. Hunt*, 60 Iowa 251; *Mott v. Dawson*, 46 Iowa, 533. If the defendant, having investigated the subject-matter of the charge with reasonable diligence and care, believed it to be true, it was not only his privilege, but his moral duty, without malice, to make it known. While that is true, he was not justified in taking advantage of the opportunity to revenge himself for real or fancied personal injuries under the pretense of working for the public good. His act must have been prompted by good motives, and intended for justifiable ends. It was the right of the jury to determine, at their discretion, the law and the fact of the case. Code, sec. 4102. There is conflict in the evidence as to some of the material facts in issue, and from some of the evidence which is not conflicting different minds might draw different conclusions. Under these circumstances we cannot say that the jury abused the discretion which the law gave them.

VIII. Numerous questions in regard to the rulings on the admission of evidence, and the charge of the court and instructions refused, are discussed by counsel, which we need not specially mention. We have examined all the questions thus presented, and find no error prejudicial to defendant. The charge of the court is quite full and favorable to him. The judgment of the court is, therefore, AFFIRMED.

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THE STATE OF IOWA, Appellant, v. CASPER MILLER, *et al.*, Appellees.

Unlawful Cohabitation: EVIDENCE: DECLARATIONS. Where a man and a woman have been indicted jointly for lewd cohabitation, proof of the declarations of one of the defendants to third persons, and not in the presence of the other defendant, is admissible in evidence; but the jury should be instructed as to the effect to be given such testimony.

Appeal from Johnson District Court.—HON. S. H. FAIRALL, Judge.

MONDAY, OCTOBER 13, 1890.

INDICTMENT for lewd and vicious cohabitation. On motion of defendants, the court directed a verdict in their favor, and the plaintiff appealed.

John Y. Stone, Attorney General, and *C. S. Ranck*, County Attorney, for the State.

No appearance for appellees.

GRANGER, J.—I. The defendant Unger is a married woman, but not the wife of her codefendant, Miller. The testimony shows that she was absent from the home of her husband much of the time specified in the indictment, and at the home of Miller, doing work in and about his house, as would a housewife; and in many respects they lived together as would husband and wife. As to unlawful intercourse, there is testimony tending in some degree to show it; and the county attorney, with a view to more fully establish the facts, sought to prove statements of one of the defendants made in the absence of the other, which the court refused to permit, saying, that "conversations of one party without the other was present are not admisble in this case." It is true both defendants are on

trial, but the rule is, in such cases, that, if the testimony is material as to one it may be admitted, and the court should by its instructions guard the jury as to the application. *People v. Arnold*, 46 Mich. 268; 9 N. W. Rep. 406; *People v. Maunausau*, 60 Mich. 15; 26 N. W. Rep. 797; *Jordan v. State*, 1 South. Rep. 577. While it may be true that in such a case the guilt of one is inconsistent with the innocence of the other, it is true that the testimony may be sufficient to convict one and not the other.

II. The remaining point in the case presents the question, whether the court erred in refusing to submit the case to the jury. The motion on which the court based its instruction to the jury to find for the defendants presents as a ground that the testimony "is not sufficient in law to sustain a verdict of guilty." We have no argument for the appellees. The testimony on which it is sought to show the fact of criminal intimacy between the defendants is circumstantial, and of such a character that a majority of this court are of the opinion that there was no error in the instruction of the district court. Considering the importance of the question, the fact that the action of the district court is conclusive in this case, and that we are unaided by brief and argument, as we should be, we think it unadvisable to embarrass a future presentation of the question by a reference to the facts.

Under the provision of Code, section 4539, the judgment of the district court must remain for the purposes of this case; but its action in excluding the offered testimony REVERSED.

JAMES CALLANAN *et al.*, Appellants, v. SARAH MERILL, Appellee.

SAME v. JOHN P. LARSON, Appellee.

Contract for Sale of Lands: DESCRIPTION: CONSTRUCTION. The plaintiffs' grantor having purchased three-fourths of the interest of Kossuth county in its swamp lands and indemnity scrip, and C. being the owner of the remaining one-fourth, except such portion

as he had become divested of by conveyance to P., said grantor of plaintiffs entered into a written contract with C. for the purchase of the lands owned by him, which, being incapable of description by numbers, or by metes and bounds, was described as, "all of said C.'s —— interest," and again, as "a conveyance of all remaining interests of whatever character which the said C. now has or hereafter may acquire in any of said lands or claims for indemnity." At the date of said contract the conveyance from C. to P. had not been recorded, but the evidence tended to show that one of the agents of the grantee named in said contract, who was negotiating for said purchase, had actual knowledge of the deed to P. *Held*, that said contract was not ambiguous, and that it conveyed only the interest C. had in said lands at the date thereof, or might thereafter acquire, and did not include the lands previously conveyed by him to P.

Appeal from Kossuth District Court.—HON. GEORGE H. CARR, Judge.

MONDAY, OCTOBER 13, 1890.

THESE actions were brought to quiet title in the plaintiffs to certain lands described. The pleadings and proofs being the same in each case, except as to the descriptions of the land in question, and the parties defendant, they were submitted together in the district court, and decrees entered for the defendants, from which plaintiffs appeal. The cases are again submitted together here.

H. E. Long, for appellants.

Clark & Call, for appellee Merrill.

W. B. Quarton, for appellee Larson.

GIVEN, J.—I. It appears from the evidence before us that in February, 1862, Asa C. Call contracted in writing to procure for Kossuth county patents for the swamp lands and the indemnity scrip to which the county was entitled, for which service he was to have one-fourth of the land and scrip procured. In pursuance of this contract, the county conveyed the land in question to Call, July 12, 1862; and on September 12,

1862, Call conveyed the same to John S. Prescott, under whom defendants claim. The deed to Prescott was not recorded until March 1, 1868. On June 19, 1862, Kossuth county sold its right to swamp lands, and to indemnity scrip, to the American Emigrant Company, and, in pursuance of that contract, executed to John Hooker and others, in trust for said company, a deed dated October 16, 1866, conveying the lands in controversy, with many other tracts. The trustees afterwards conveyed to the company; and on December 17, 1885, the company conveyed to the plaintiffs. On March 24, 1866, Call executed a conveyance to the American Emigrant Company, which was duly acknowledged and recorded. The construction of this conveyance, and the effect of the failure to record the deed to Prescott before the conveyance was executed, are the controlling questions in the case. This conveyance is as follows:

"Agreement made and concluded this twenty-fourth day of March, 1866, by and between the American Emigrant Company, by its general agent, F. C. D. McKay, of the one part, and Asa C. Call, of the county of Kossuth, of the other part, as follows, to-wit: The American Emigrant Company are the owners of three-fourths of the swamp and overflowed lands, and claim on the general government for the swamp and overflowed lands, and cash and scrip indemnity for the same, of the county of Kossuth, in the state of Iowa. The said Call has a contract with the said county for the remaining fourth of the swamp and overflowed lands, and cash and scrip indemnity for the same, of the county, and owes the county, as a part of the consideration therefor, about fourteen hundred dollars. The company have purchased *all of said Call's interest*, and agree to pay him therefor the following prices, on the terms and conditions hereinafter specified. The company agree to pay him at the rate of thirty cents per acre for all lands and indemnity which the said company shall finally realize out of the one-fourth interest claimed by Call, one thousand dollars of which is herewith paid to said Call in a draft on

the treasurer of the company, payable sixty days after sight, the receipt of which is hereby acknowledged; fourteen hundred dollars of which purchase money is to be by the company reserved out of and from the money to be paid said Call, to enable the company, in whole or in part, to purchase the said land of Kossuth county, in case the said contract between Call and the county should be violated; and the balance, if any there be, after taking out the said twenty-four hundred dollars of the purchase money, is to become due and payable to the said Call as soon as it can be definitely ascertained what amount of lands are acquired by the company out of *Call's interest*. In case there should be a delay in the first settlement with the government or any parties, it is agreed that the excess of the purchase money over and above the said twenty-four hundred dollars shall be paid the said Call at the end of each and every year from this date, from time to time, as the titles to the lands are acquired by the company. If at any time the company deem it necessary, the said Call will, upon request, make and execute to said company any further or different conveyance *of his interest* in said lands, with or without lists, and will, if requested, release to the county or the company *all claims to any interest* in the same under this contract. *This contract is to operate as a conveyance of all remaining interest of whatever character which the said Call now has or hereafter may acquire in any of said lands or claims for indemnity* (which interest and claim has been duly examined, and is understood by the company), by virtue of his contract with the county before alluded to, but nothing in the foregoing instrument contained shall make said Call personally liable in case of a failure of title to any of said lands. In testimony whereof we have hereunto affixed our hands this twenty-fourth day of March, A. D. 1866.

"[Signed] ASA C. CALL.

"[Duly acknowledged.]"

II. Appellants contend that by this instrument Asa C. Call conveyed to the American Emigrant Company

his one-fourth interest in all the lands he had, or was to get, under his contract with Kossuth county, while appellees contend that it is only a conveyance of the interest which he then had, or might thereafter acquire, and that, having theretofore conveyed the lands in controversy to Prescott, he did not then have or convey any interest therein to the emigrant company. Question is made whether the conveyance from Call to Prescott was prior to his conveyance to the emigrant company. The deed is dated September 12, 1862, and there is nothing to contradict the inference that arises that it was executed at that date. We are satisfied the conveyance to Prescott was prior to the conveyance to the emigrant company. This instrument from Call to the emigrant company was the subject of construction, with respect to certain questions raised by demurrer to the petition, in the case of *Emigrant Co. v. Clark*, 62 Iowa, 183, wherein the plaintiff asked to have its title quieted to certain swamp lands, as against a conveyance made by Call after he executed this instrument to the emigrant company. The questions considered were whether the instrument was a conveyance or a mere contract for a conveyance, and, if a conveyance, whether it included the land conveyed by Call to Clark. It will be observed that in that case the question was as to a subsequent conveyance by Call, while in this it is as to a prior one. There is no such ambiguity in this instrument as will admit of the consideration of parol evidence in explanation of it. Read in the light of the circumstances under which the parties contracted, their intent and meaning is ascertainable from the writing.

Appellants rely largely upon certain expressions with respect to this instrument contained in the last paragraph of the opinion in *Emigrant Co. v. Clark*, *supra*. It must be remembered that those expressions are with reference to the question whether the conveyance from Call to the company included the land thereafter conveyed by him to Clark. After holding that the instrument is a conveyance, the court, in considering whether it included the land subsequently conveyed to

Clark, says: "It is evident, however, that the instrument in question refers to all the swamp and overflowed lands of Kossuth county, except the three-fourths already claimed by the plaintiff. The petition alleges that in pursuance of said contract the county conveyed said land to Call. It appears, from the allegations of the petition, therefore, that the lands in controversy inured to Call by virtue of his contract with the county; and the instrument declares that it is to operate as a conveyance of all remaining interests which Call now has or may hereafter acquire, by virtue of his contract with the county. The instrument does, in our opinion, under the allegations of the petition, embrace the lands in controversy, although before that time conveyed to Call." In determining whether the conveyance was sufficiently definite in its description of the property, it is further said: "The contract embraces all the land inuring to Call under his contract with the county." None of the expressions in the instrument relied upon as limiting it to the interest that Call then had or might thereafter acquire are referred to in this opinion, nor was it necessary; for that question was not before the court as to a previous conveyance. *Emigrant Co. v. Call*, 22 Fed. Rep. 765, is also relied upon. In that case, the question was whether the indexing of the record of the conveyance from Call to the American Emigrant Company was such as to give notice to Sweeting, a subsequent purchaser from Call. The court followed the case against Clark in holding the instrument to be a conveyance, and held that the indexing was sufficient to put purchasers upon inquiry; but the question now under consideration was not before that court.

III. In construing this conveyance, we are to consider the circumstances under which it was executed and received. The American Emigrant Company, having purchased the three-fourths interest of the county in its swamp lands and indemnity scrip, desired to purchase the other fourth. Mr. Call had become owner of that fourth under his contract with the county, and then held the same, except as he had been divested by

the conveyance to Prescott. The conveyance under consideration shows that it was impracticable, if not impossible, at the time of its execution to describe the lands being conveyed in the usual manner. Being impracticable to identify the subject-matter of the contract by numbers or metes or bounds in the usual way, it is identified by reference to it as the swamp and overflowed lands, and indemnity scrip, of Kossuth county, of which the emigrant company owns three-fourths, and for the remaining fourth of which Call has a contract with the county. The second paragraph of the instrument points out the subject of the contract, but does not declare what part thereof, or interest therein, has been purchased, or is being conveyed. The next paragraph makes clear what was purchased: "The company have purchased all of said Call's interest, and agree to pay him therefor." The last paragraph is equally definite as to what was conveyed: "This contract is to operate as a conveyance of all remaining interests of whatever character which the said Call now has or hereafter may acquire in any of said lands or claims for indemnity." This language is in direct conflict with the claim that Call was conveying all that he ever had acquired under the contract with the county. It is not so expressed, and the "conveyance of all remaining interests" precludes the idea that he was conveying more than he then had. We think this instrument is plain and unambiguous, and shows upon its face that Call was to, and did, convey only the interest he then had, or might thereafter acquire, under his contract with the county, and not all the interest that he ever had, or might thereafter acquire, under that contract.

IV. It is contended that the emigrant company purchased from Call without notice of the deed to Prescott. That the company had no notice by record is evident, for that deed was not then recorded. Mr. Savery testifies that none of the agents of the company had actual notice or knowledge of the existence of that deed. While this may be true as to Savery, we are not

satisfied that it is true as to the other agent of the company, Mr. McKay, who was equally active in the negotiations with Call. The language of the conveyance, and all the circumstances, tend to show that Call did not conceal the fact of that conveyance. There is no reason apparent why he should. He was to be paid according to the amount of land the company got, and to have withheld these few acres from so large a transaction would certainly not have prevented the deal. The language of the conveyance quoted above goes far to satisfy us that the emigrant company purchased with knowledge of the deed to Prescott.

As the foregoing conclusions fully dispose of the case, it is unnecessary that we notice the discussion further. The decree of the district court is AFFIRMED.

DAVID BRADLEY & CO., Appellants, V. AUGUST BISCHEL *et al.*, Appellees.

1. **Assignment for the Benefit of Creditors:** PROPERTY EXEMPT FROM EXECUTION. A provision in a general assignment for the benefit of creditors reserving to the assignor property exempt from execution will not render the assignment invalid.

2. ———: COPARTNERSHIP: INDIVIDUAL CREDITORS. A general assignment by a copartnership for the benefit of the creditors of the firm, without provision for the creditors of the individual partners, is valid.

3. ———: FRAUDULENT INTENTION OF ASSIGNOR. The belief of an insolvent in the execution of a general assignment, that he will thereby be absolved from all further obligation to his creditors, will not affect the validity of the deed if made according to law.

4. ———: EXECUTION OF TRUST. Carelessness or dishonesty in the disposition of property under a general assignment on the part of those intrusted with the execution of the trust will not invalidate the deed of assignment.

Appeal from Cherokee District Court.—HON. C. H. LEWIS, Judge.

MONDAY, OCTOBER 13, 1890.

ACTION by attachment upon an account for goods sold. Intervenors claimed the right to the property attached, and their claim was sustained by the judgment of the district court. From this judgment plaintiffs appeal.

Wright, Baldwin & Haldane, for appellants.

W. Wakefield, for appellees.

BECK, J.—I. The petition was filed and the attachment was issued on the twenty-first day of January, 1888, and at 12:50 o'clock P. M. the property in controversy was seized under the attachment. D. M. Beams, on the twenty-first day of February, 1888, intervened in the action by petition, claiming the property, or a part of it, under a chattel mortgage executed by August Bischel, March 11, 1886, to secure a promissory note of same date, given for the purchase of some of the goods in controversy. It was acknowledged on the twentieth day of January, 1888, and filed for record on the next day, at one o'clock P. M. McMillan became a partner of Bischel, acquiring an interest as such in the goods. Subsequently, on the eleventh day of January, 1888, the firm, being known by the style of A. Bischel & Co., in that name executed to James P. Mallison, assignee, an assignment of all the property of the firm for the benefit of all its creditors. Beams, claiming under his mortgage, and Mallison, claiming as assignee, intervened, and separately set up and urged their rights to the property in question. No controversy arises in this appeal between the intervenors; the controversy being wholly between plaintiffs and the intervenors. The assignee, Mallison, seems to concede Beams' claim under his mortgage.

It will be observed that plaintiffs' claim to the property rests upon the attachment proceedings, in which it was seized, while Beams' claim rests on his mortgage, and Mallison's upon the assignment. We need not consider the objection made by plaintiffs to the

validity of Beams' mortgage, if we find that the assignment to Mallison is valid, and passes to him the right as an assignee to the goods, for the reason that the plaintiff, in case the mortgage should be held invalid, would have no right to the property which passes under the assignment. Nor need we question the regularity of plaintiffs' attachment proceedings, assuming that they are sufficient. The case is not presented with usual clearness, which has imposed upon us much unnecessary and vexatious labor. But, by patient consideration of the abstract, we believe that we have been enabled to determine the controlling facts in the case.

II. Plaintiffs assail the assignment to Mallison, with objections directed against several points of attack. They will be considered in the order of their discussion in the argument of plaintiffs' counsel. The assignment is in the following language:

1. ASSIGNMENT: for the benefit of creditors: property exempt from execution.

"Know all men by these presents, that the firm of A. Bischel & Co., of Aurelia, Iowa, a firm composed of August Bischel and J. W. McMillan, and doing business under the firm-name and style of A. Bischel & Co., hereby assigns and conveys unto James P. Mallison, of Aurelia, Iowa, all of the property of the said firm not exempt from execution, for the benefit of all of the creditors of said firm, in proportion to the amount of their respective claims and demands. This conveyance is made subject to any existing mortgages on said property or any of it. Done this eleventh day of January, A. D. 1888."

"A. BISCHEL & Co."

III. It is first objected that this instrument is not a general assignment of all the property of the assignor, for the reason that it excepts property exempt from execution, and is for the benefit of the creditors of the firm alone. Property "exempt from execution" cannot be taken by the creditor, and may be held by the debtor free from liability for his debts. If such property be omitted from an assignment the instrument is not affected thereby; for it conveys all property which is subject to

the debts. It would be strange indeed, if property not subject to debts must be conveyed only to be discharged therefrom. The exempt property need not be conveyed by the assignment. In this case, as the description was general, covering all the assignor's property, the exception of exempt property, properly, was introduced as a description of the property intended to be transferred. *Perry v. Vezina*, 63 Iowa, 27.

IV. It is next insisted that, as the instrument declares that it is made for the benefit of the firm creditors, it is not in compliance with the law. The assignment was of firm property, which must be first applied to firm debts. The provision of the instrument in this regard is simply in harmony with the law. If, after the firm debts are paid, a balance should remain, the law will provide proceedings wherein that balance may be paid to the creditors of the copartners, if there be any. *Auley v. Osterman*, 65 Wis. 118; 25 N. W. Rep. 657, and 26 N. W. Rep. 568; *Blake v. Falkner*, 18 Ind. 47; *Ex parte Hopkins*, 104 Ind. 157; 2 N. E. Rep. 587.

2. —: copartnership: individual creditors.

V. The plaintiffs, in one of their pleadings, allege that the assignment was made to hinder, delay and defraud creditors. Counsel for the plaintiffs insist that this allegation is established by the evidence, in that it shows that the assignment was made by defendants in the hope, based upon ignorance of the law, that the assignors would be relieved of their debts, so far as they should remain unpaid after the assignment proceedings were closed, and that they would derive other benefits therefrom. The purposes and intentions of the assignors cannot defeat a valid assignment for the benefit of creditors. The assignment executed by the debtor puts the property assigned in the custody of the law, the proceeds thereof to be paid to the creditors of the assignor. The interest and rights of the creditors cannot be affected prejudicially, or defeated, by the fraudulent purpose of the assignor

3. FRAUDULENT intention of assignor.

VI. It is also insisted that the evidence warrants the conclusion that the debtor intended or desired that the property, after the assignment, was not managed carefully, honestly, and for the best interest of the creditors. Assuming that the creditors were thus attempting to defraud and cheat themselves, it is not a matter of which they can complain. But, assuming that counsel intend to charge that a part of the creditors were so acting, the others had their ready remedy by applying to the proper court for a correction of such things, which would have been speedily ordered. These considerations lead to the satisfactory conclusion that the judgment of the district court ought to be AFFIRMED.

4. EXECUTION of trust.

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CONRAD LICH, Jr., Appellant, v. CONRAD LICH, Sr., *et al.*, Appellees.

Real Estate: GIFT: SPECIFIC PERFORMANCE. The defendant, a man advanced in years, being the owner of two hundred and twenty acres of land, and having three sons and a daughter, wrote two of the former, who resided in a distant state, that if they would return home he would defray a part of their traveling expenses, divide his land, with the exception of five or six acres reserved for his own use, into equal parts, apportion the same by each of the children drawing cuts for his share, and then he would ask no more than the fourth part of what they could raise. The absent sons returned home, and, after a residence of some months with their parents, the plaintiff took up his residence in a log-house on a part of the farm that was marked off and designated as for him, and continued to occupy and farm the same for about twelve years, when he made a sale of all his personal property, removed to another state, entered one hundred and sixty acres of land, and remained there a year or two, until he had proved up the same as a homestead. During plaintiff's absence his father rented the land that had been occupied by him to another, but upon plaintiff's return he again took possession. *Held*, that the evidence was insufficient to establish an agreement on the part of defendant to convey to plaintiff as a gift the land occupied by him.

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

MONDAY, OCTOBER 13, 1890.

THE defendant holds the legal title to a farm in Des Moines county, consisting of two hundred and twenty acres. The plaintiff, who is the son of the defendant, has been in the possession of part of the farm for a number of years. The defendant commenced an action of forcible detainer against the son to obtain possession of the land. The plaintiff commenced this action in equity, claiming that in November, 1868, the parties made a verbal contract by which the plaintiff purchased the land of defendant; that possession was taken under the contract, and the land improved by the plaintiff. A specific performance of the alleged verbal contract was demanded. The action for the possession was enjoined. Issue was taken upon the petition for specific performance. A trial was had upon the merits, and a decree was entered dissolving the injunction, and dismissing the petition. The plaintiff appeals.

T. J. Trulock and *A. H. Stutsman*, for appellant.

Seerley & Clark and *Theo. Guelich*, for appellee.

ROTHROCK, C. J.—I. A question is made by counsel for appellee as to the right of the plaintiff to maintain the action. It is urged that he should have set up his claim to the land in an answer to the action of forcible detainer, and that the justice of the peace, before whom the proceeding was pending, would have certified the case to the district court as involving the title to real estate, and that all of the rights of the parties could have been determined in that action. The conclusion we have reached upon the merits of the case renders it unnecessary to determine that question, and it is for the interest of the parties that the controversy between them be determined without further litigation.

II. The farm has been owned by the defendant for many years, and we infer from the evidence that it is quite valuable. He had three sons and one daughter. Before the arrangement was made which plaintiff claims was a purchase of part of the farm by him of his

VI. It is also insisted that the evidence warrants the conclusion that the debtor intended or desired that the property, after the assignment, was not managed carefully, honestly, and for the best interest of the creditors. Assuming that the creditors were thus attempting to defraud and cheat themselves, it is not a matter of which they can complain. But, assuming that counsel intend to charge that a part of the creditors were so acting, the others had their ready remedy by applying to the proper court for a correction of such things, which would have been speedily ordered. These considerations lead to the satisfactory conclusion that the judgment of the district court ought to be AFFIRMED.

4. EXECUTION of trust.

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CONRAD LICH, Jr., Appellant, v. CONRAD LICH, Sr., *et al.*, Appellees.

Real Estate: GIFT: SPECIFIC PERFORMANCE. The defendant, a man advanced in years, being the owner of two hundred and twenty acres of land, and having three sons and a daughter, wrote two of the former, who resided in a distant state, that if they would return home he would defray a part of their traveling expenses, divide his land, with the exception of five or six acres reserved for his own use, into equal parts, apportion the same by each of the children drawing cuts for his share, and then he would ask no more than the fourth part of what they could raise. The absent sons returned home, and, after a residence of some months with their parents, the plaintiff took up his residence in a log-house on a part of the farm that was marked off and designated as for him, and continued to occupy and farm the same for about twelve years, when he made a sale of all his personal property, removed to another state, entered one hundred and sixty acres of land, and remained there a year or two, until he had proved up the same as a homestead. During plaintiff's absence his father rented the land that had been occupied by him to another, but upon plaintiff's return he again took possession. *Held*, that the evidence was insufficient to establish an agreement on the part of defendant to convey to plaintiff as a gift the land occupied by him.

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T. J. Trulock and *A. H. Stutsman*, for appellant.

Seerley & Clark and *Theo. Guelich*, for appellee.

ROTHROCK, C. J.—I. A question is made by counsel for appellee as to the right of the plaintiff to maintain the action. It is urged that he should have set up his claim to the land in an answer to the action of forcible detainer, and that the justice of the peace, before whom the proceeding was pending, would have certified the case to the district court as involving the title to real estate, and that all of the rights of the parties could have been determined in that action. The conclusion we have reached upon the merits of the case renders it unnecessary to determine that question, and it is for the interest of the parties that the controversy between them be determined without further litigation.

II. The farm has been owned by the defendant for many years, and we infer from the evidence that it is quite valuable. He had three sons and one daughter. Before the arrangement was made which plaintiff claims was a purchase of part of the farm by him of his

father, the plaintiff and his brother William had removed to the state of California. The plaintiff was then married. The daughter was also married, and resided in the city of Burlington. The other son, named Henry, was unmarried, and lived at home on the farm with his parents. The father and mother desired that William and the plaintiff should return from California, and wrote letters to them to that effect. On the tenth day of June, 1867, the defendant wrote a letter to the plaintiff which was as follows:

"*Dear Children* [*Conrad and Mary Lich*]:—We received your welcome letter the eighth of June, and have seen out of it that you are well. You write in your letter that you don't know whether you will get anything if you come back or not. Now, I will tell you boys what I am willing to do with you all. I am willing to defray some of your expenses for your coming back, and then I will divide my land in equal pieces, and then you may draw cuts, each of you, and then I don't ask no more than the fourth part of what you raise, with the exception of about five or six acres, which I reserve for me. You boys can have it all. I can't work much more, and your mother neither. You write me in your letter you are doing pretty well there, and I wouldn't force you to come back if you think that you are doing better there than you could here. We like very much to have you here, and every one of you is welcome. You come, and your wife, and your brother William, and believe us that your wife will be as well respected as any of our other children. If you shouldn't want to come back, let me know it at once, and say yes or no, so I know what I have to do. We had a very cold and wet spring. It delayed us very much, so that I only could plant twenty acres of corn in May month. The rest I had to plant in June. I have a hired hand, and have to pay him twenty-six dollars a month.

"[Signed in German] CONRAD LICH."

The plaintiff and his brother William returned from California in the fall of 1868, and remained during the

winter with their father and mother. In the spring of 1869, the plaintiff took up his residence in a log-house on the farm, and farmed the part of the land now in dispute up to the present time, with the exception of an absence in California for a time.

It is claimed that by a proper construction of the above letter, and the acts of the parties, the plaintiff became the equitable owner of the land which he now claims. On the other hand, it is claimed by the defendant that the occupancy of the land by plaintiff has been that of a mere tenant. It is true, as claimed by the plaintiff, that a certain part of the farm was marked off and designated as for him, but the evidence is far from convincing the mind that the defendant intended that the occupancy by plaintiff should be that of an owner. In the light of all the evidence, the offer in the letter to divide the land in equal parts, and to draw cuts, and that the boys were to have it all, is as consistent with the claim of the defendant that he intended to give his sons permanent homes on the land as tenants at a low rent, as that he intended to make a final disposition of his farm. It is claimed by plaintiff that he put valuable improvements on the land in the belief that he was the owner, and that defendant knew this, and ought not now be allowed to take advantage of the labor and outlay of the plaintiff for nearly his whole life. There is much conflict in the evidence as to the value and nature of the improvements. There is good reason for holding that a greater part of the money paid out for improvements was paid by the defendant. There is one most important circumstance which to our minds is inconsistent with the claim made by the plaintiff. It is this: In the year 1881, he made a sale and sold out everything he had in the way of personal property, including some sheds he had put upon the land, sold his stock and farming implements, and his household and kitchen furniture, and removed to California, and remained a year or two, and entered one hundred and sixty acres of land, and proved it up, as a homestead. While he was gone the defendant rented the land to others. It is

true the plaintiff claims that the leasing to others by his father was for him, but we think this claim cannot be maintained. When the plaintiff came back again he went on the land. His father refused to rent to anyone when the plaintiff wanted to return to it, and make his home there. It is to be remembered that the alleged parol contract is within the statute of frauds, and the burden is on the plaintiff to take it out of the operation of the statute by showing that it is within the exception of part performance. When this is sought to be established, it has long been held that the proof must be clear and unequivocal. In *Williamson v. Williamson*, 4 Iowa, 279, it is said: "If a party would take a case out of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement or gift should be established by clear, unequivocal and definite testimony, and the acts claimed to be done thereunder should be equally clear and definite, and referable exclusively to the said contract or gift."

The decree of the district court will be AFFIRMED.

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THE STATE OF IOWA, Appellee, v. CORNELIUS O'BRIEN JR., Appellant.

1. **Murder**: EVIDENCE: DECLARATIONS OF WITNESS DECEASED. Proof of the declarations of a witness, since deceased, upon the trial of one on preliminary information for assault and battery, may be made in a subsequent trial of the same defendant on a charge of murder, based upon the same act, by a witness who was present at the former trial, and heard the testimony of such deceased witness, and remembers, and can repeat, the substance of the whole of his testimony, though he cannot remember the exact language used by the deceased, nor state the facts in the order in which they were testified to.

2. ——— : ——— : ANTE-MORTEM STATEMENT. An *ante-mortem* statement by the victim of an assault resulting in death, made at a time when he believes that his death is near at hand, and giving the facts as he claims them to be, is competent evidence against

one accused of making such assault; and its admission in evidence will not be deemed erroneous by reason of a single incompetent statement therein, which might have been excluded upon the objection of the defendant.

3. ———: DECEDENT'S POSSESSION OF DISEASE OF FATAL NATURE: DEFENSE. The fact that the victim of an assault, resulting in death, was afflicted with a disease of a fatal nature, will not justify the wrongful act of his assailant, nor constitute a legal defense to the crime committed. whether the latter had knowledge of decedent's physical condition at the time of the assault or not.

4. ———: VERDICT: SUFFICIENCY OF EVIDENCE. The evidence in this case reviewed by the court, and *held* to sustain a verdict against the defendant for manslaughter.

Appeal from Mitchell District Court.—HON. G. W. RUDDICK, Judge.

MONDAY, OCTOBER 13, 1890.

THE defendant was indicted for the crime of murder, and upon a trial was found guilty of manslaughter. He was adjudged to be imprisoned for two years at hard labor in the penitentiary at Anamosa, and to pay the costs, and from that judgment he appeals.

W. L. Eaton and *J. M. Moody*, for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the State.

ROBINSON, J.—The state claims, and the evidence tends to show, that the material facts of this case are substantially as follows: Prior to the fifteenth day of July, 1888, the defendant entertained ill will towards one Henry Stocum, on the alleged ground that the latter had accused him of throwing cream cans into the well of a Mr. Lida. He threatened Stocum with physical violence, to different persons, and seemed to be seeking an encounter with him. Both were boys about seventeen years of age, and of about the same size and weight, but Stocum had been affected for some time by a heart trouble, and was not strong. During the

evening of the day named, defendant, accompanied by Warren and Willie Murphy, met Stocum in the highway, and assaulted him, knocking him down, holding and choking him after he was down, and kicking him himself, or causing him to be kicked by Warren Murphy. After Stocum was released, he was chased for a considerable distance. Stocum was much excited by the encounter, and lost health and strength rapidly from that time until the twenty-eighth day of July, 1888, when he died from the effects of the injuries caused by defendant.

It is admitted by defendant that he encountered Stocum at the time and place claimed by the state, and that he then struck him; but he claims that no one was present but himself and Stocum, and that all he did was done in self-defense. He denies that the death of Stocum was the result of injuries received in that encounter, and claims that it was due to causes for which he was not responsible.

I. After the encounter described took place, defendant was arrested and tried on preliminary information, which charged him with the crime of assault and battery committed upon Stocum at the time and place stated. On that hearing Stocum testified in regard to the matter, giving his version of what occurred; and on the trial in the district court several witnesses were examined on the part of the state as to the testimony so given by Stocum. Appellant insists that such evidence was improperly admitted, for the reason that it does not appear that any of the witnesses remembered or testified to all the evidence given by Stocum. It is well settled that a person, who heard and recollects the testimony of a person deceased, may testify in regard to it, and it is not necessary in such a case for the witness to remember and repeat all of what was said in the language used by the deceased. It is sufficient for him to repeat the substance of all the testimony of the deceased. *Small v. Chicago, R. I. & P. Ry. Co.*, 55 Iowa, 582; *Fell v. Burlington, C. R. & N. Ry. Co.*, 43 Iowa, 177;

1. MURDER: evidence: declarations of witness deceased.

Harrison v. Charlton, 42 Iowa, 573; *Rivereau v. St. Ament*, 3 G. Greene, 118. And the same rule is applicable in criminal cases. *State v. Fitzgerald*, 63 Iowa, 268.

The witnesses in question repeated the substance of Stocum's testimony. Some were unable to give the order in which the statements were made, but we do not think that was a fatal objection. One witness testified that he did not remember the questions asked Stocum on cross-examination, nor any of them, and he did not know that he remembered any of the testimony he gave on cross-examination. He had stated that his recollection was good enough to give the substance of Stocum's testimony, and if he meant by his answers, with respect to the cross-examination, that he did not recollect what part of the testimony was given on the direct, and what part on the cross-examination, we do not think he showed that his testimony was not competent. The material question was, what did Stocum say, not in what order did he say it? If he meant that he did not recollect what Stocum said on cross-examination, his testimony was not competent, and, on application, should have been excluded. *Harrison v. Charlton*, 42 Iowa, 573. But his answers now under consideration were given at the close of his examination, and it does not appear that any effort was then made to exclude his testimony.

II. A short time before his death, Stocum made a statement in regard to the assault of defendant, giving the facts, as he claimed them to be. Appellant objected to proof of what he said. We think it was competent. It clearly appears that, at the time he made the declaration, he believed that he should not recover, and that his death was near. He was despondent, and sent for a priest to prepare him for death. Most of what he said was a narration of facts, but he also said that "everybody would know that Corny O'Brien and Warren Murphy were the cause of his death." It may be admitted that the statement was incompetent, and should have been

2. —: —: ante-mortem statement.

excluded on objection; but the question did not indicate the character of the answer which was made, and no objection was offered to the answer as given, and defendant cannot now be heard to complain of it.

III. It is suggested that the verdict is not supported by the evidence, and that it is not shown that the death of Stocum resulted from injuries inflicted by the defendant. The evidence shows that decedent had not been in good health for several months. About three weeks before the assault in question, he consulted a physician, who found his heart in a diseased condition, and treated him for heart difficulty. He improved steadily under that treatment until the assault was made. If his testimony at the preliminary examination and his dying declaration were correct, he was choked and kicked and otherwise grossly maltreated by defendant. It is certain that he was greatly excited by the encounter. Immediately after it occurred he applied at a house in the vicinity for shelter, stating that he was afraid to go home on account of defendant and the Murphy boys. A witness says of his appearance at that time: "He acted just scared to death. His face was as pale as death; his lips were swollen. His hat was torn and had mud on both sides." His health failed rapidly from that time. A witness who saw him the day after the assault describes his appearance and condition as follows: "I discovered he was in pretty bad shape; he was pale, haggard; almost impossible for him to breathe. I thought he would reel right over on the stoop there. His shoulder blades worked like a bellows. His voice was weak. His lips, dark blue." The medical testimony shows that his condition and failing health after the assault, and his death, were natural and probable results of his physical condition on the night of July 15, and of great excitement and physical exertion.

8. ——: decedent's possession of disease of fatal nature: defense.

IV. It was the province of the jury to determine whether the wrong of defendant caused or contributed to decedent's death. The fact that he was afflicted with a disease which might have proved

4. ——: verdict: sufficiency of evidence.

fatal would not justify the wrongful acts of defendant, nor constitute a defense in law. *State v. Smith*, 73 Iowa, 32. Nor would ignorance on the part of defendant of the diseased physical condition of Stocum excuse his acts. *State v. Castello*, 62 Iowa, 404. We think the evidence sufficient to sustain the verdict, and find no error prejudicial to defendant of which he can complain. The judgment of the district court is AFFIRMED.

THE STATE OF IOWA, Appellee, v. JAMES O'BRIEN *et al.*, Appellants.

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1. **Burglary**: EVIDENCE. The defendants, three in number, were jointly indicted for burglary of goods in a storeroom. The person in charge of the store testified that the door of the store was shut and latched, and that defendants entered by raising the latch; while the defendants all testified that the door was open when they entered. *Held*, that the finding of the jury against the defendants cannot be said to be without justification.

2. ——: LIFTING A LATCH IS A "BREAKING." Lifting the latch of a door to a building. and entering therein, is a "breaking" into such building within the meaning of the statute against burglarys

3. ——: OWNERSHIP OF PREMISES. An indictment which charge. one with burglariously breaking and entering "a certain store of one W. W. Doolittle," sufficiently alleges the ownership of said premises.

4. ——: TESTIMONY OF ACCUSED: CROSS-EXAMINATION. A defend ant, on trial for the crime of burglary, who has testified on direct examination to having seen a stranger come out of the premises entered as he went in, may be required on cross-examination to state who remained on the premises in question.

5. ——: ——: ——. A person on trial for a criminal offense, who testifies in his own behalf, may, for the purposes of impeachment, be questioned on cross-examination as to former convictions for offenses previously committed by him.

Appeal from Marshall District Court.—HON. S. M. WEAVER, Judge.

TUESDAY, OCTOBER 14, 1890.

THE defendants, James O'Brien, James Morgan and John Shay, were indicted and convicted of burglary, and now appeal to this court.

J. L. Carney, for appellants.

John Y. Stone, Attorney General, and *W. W. Miller*, County Attorney, for the State.

BECK, J.—The indictment is under Code, section 3894, and is in the following language: "The said James O'Brien, James Morgan and John Shay, on the nineteenth day of November, A. D. 1889, in the county aforesaid, did unlawfully, feloniously and burglariously break and enter a certain store of one W. W. Doolittle, in which goods, wares and merchandise of said W. W. Doolittle were kept for sale, use and deposit by the said W. W. Doolittle, with a felonious intent on the part of said James O'Brien, James Morgan and John Shay then and there feloniously to take, steal and carry away the said goods, wares and merchandise of said W. W. Doolittle, then and there to commit a public offense, to-wit, larceny, contrary to and in violation of law."

I. The evidence shows that defendants entered a store owned by W. W. Doolittle, which was in charge of M. W. Doolittle. O'Brien entered a few minutes after the others went in. The person in charge of the store testifies that the door of the store was shut and latched, and that the defendants entered by raising the latch. Defendants all testify that the door was open when they entered. We cannot say that the jury were not justified in basing their finding on the evidence of the person in charge of the store, rather than upon the evidence of the defendants. It is not surprising that the jury would give more weight to his evidence than to the testimony of the three persons, shown beyond a doubt to be guilty of a felony.

1. BURGLARY: evidence.

II. The defendants were together in the store, and, while the attendant was showing them, or some of

2. ——: lifting a latch is a "breaking."

them, goods, Shay took a garment, and concealed it under an overcoat carried on his arm. The attendant discovered the stolen goods, and drew them from the place of concealment, and called for help. Thereupon O'Brien struck him, and, with the other defendants, fled from the store.

It is first insisted that the evidence does not show that a burglary was committed, in that the evidence shows that the defendants entered by lifting the latch of the door, which is not a breaking contemplated by the statute. The word "break" used by the statute does not imply the use of any degree of force or violence, in order to injure or destroy any part of the building, but the force that is necessary to remove impediments to entering, as the opening of doors. The latch of the door is used to keep the door shut, and exclude entrance. The lifting of the latch removes the impediment designed to prevent an entrance, and is, therefore, a breaking, within the contemplation of the law. See, in support of these views, Whart. American Crim. Law, sec. 1532; 1 Bish. Crim. Law, sec. 190.

III. It is next insisted that the indictment does not show who was the owner of the building. But it clearly appears to the contrary by reading the indictment.

3. ——: ownership of premises.

IV. The defendant Shay, on cross-examination, testified as to a person, and his description, whom he saw in the store when the crime was committed. It was objected to as not being proper cross-examination. He testified that a stranger came out of the store as he went in. We see no impropriety in requiring him to state who were left in the store. We discover no prejudice to defendants from this testimony.

4. ——: testimony of accused: cross-examination.

V. O'Brien testified, on cross-examination, as to convictions for offenses he had committed, and the places he had visited. It is insisted that the evidence is immaterial, and was not properly elicited upon cross-examination. The meager abstract fails to show that it was not rightly elicited on

5. THE SAME.

cross-examination, as it fails to show the questions asked the witness upon the examination in chief, and upon the cross-examination. As the evidence tended to impeach the witness, it was not immaterial. It was not claimed in the court below, and is not in this court, that the evidence is incompetent.

We think the rules permitting a witness to be examined on cross-examination to show convictions for crimes committed by him, in order to impeach him, applies to persons charged with crimes when they appear themselves as witnesses. See *State v. Kirkpatrick*, 63 Iowa, 554; *State v. Teeter*, 69 Iowa, 717. Of course they may, as other witnesses, decline to answer questions, if their evidence would tend to criminate themselves. But no such protection was claimed in this case.

VI. The sentence of O'Brien was imprisonment in the penitentiary for ten years, and of the other defendants for six years each. It is insisted that the punishment is excessive. We think otherwise. The judgment of the district court is AFFIRMED.

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I. L. POTTER, Appellant, v. TIMOTHY KENNELLY, Appellee.

Alteration of Written Instrument: EVIDENCE. The plaintiff, having commenced this action to foreclose a mortgage, the mortgagor answered admitting his signature to the instrument, but alleging that since its execution the property description therein had been altered so that it covered sixty acres of land instead of twenty, and that the additional forty acres constituted his homestead. These allegations were supported by the testimony of the mortgagor and his son, but the loan agent, who drew up the mortgage, testified that it was originally drawn to cover the sixty acres, and that he refused to make the loan on the twenty acres. Among other circumstances corroborative of the loan agent's testimony was the fact that the twenty acres was insufficient security for the loan made. *Held*, that the burden of proof being upon the mortgagor the charge of alteration was not established.

Appeal from Monroe District Court.—HON. DEL STUART, Judge.

TUESDAY, OCTOBER 14, 1890.

ACTION in equity for judgment on a promissory note, and to foreclose a mortgage upon sixty acres of land to secure the payment of the note. The defendant answered, admitting his signature to the note and mortgage, but averring that the mortgage was originally given upon twenty acres of land, and no more, and that it was afterwards, without his knowledge or consent, altered so as to include forty acres in addition to the twenty acres actually mortgaged. The court found that this averment of the answer was true, and entered a judgment against the defendant for the amount of the note, and a decree of foreclosure against twenty acres of the land. Plaintiff appeals.

McCahan & Richmond and *T. B. Perry*, for appellant.

W. A. Nichol, for appellee.

ROTHROCK, C. J.—The only question to be determined is, was the mortgage altered or changed after its execution? The burden of proving the alleged alteration was on the defendant. *Vanhorn v. Bell*, 11 Iowa, 465; *Warren v. Chickasaw Co.*, 13 Iowa, 588; *Odell v. Gallup*, 62 Iowa, 253; *Wing v. Stewart*, 68 Iowa, 13. The note was for one hundred dollars, borrowed money, and it recites that it is secured by a mortgage upon real estate valued at nine hundred dollars. It appears that the twenty acres, which it was conceded was included in the mortgage, was, at the time the mortgage was made, subject to the lien of a judgment. Indeed, it may be safely held that the twenty acres is inadequate security for the money due. If it was adequate, it is not likely this defense would have been interposed, nor this appeal taken. Parties are not supposed to be involved in litigation for pleasure or pastime.

The loan was made for the plaintiff by one H. K. Steele, an insurance and loan agent. The defendant was in urgent need of the money. His horses had been levied upon for a debt. Steele testified, as a witness, that defendant offered him the twenty acres as security, and that he refused to take it, as there was a judgment lien that would probably take it, and that the defendant then directed him to make the mortgage on the whole sixty acres, including the forty acres, which is and was defendant's homestead; that he (Steele) told the defendant he did not care anything about the twenty acres, that the forty acres would be sufficient; but that defendant insisted that all the land should be included in the mortgage. Steele testified that the mortgage was so written, and there has been no alteration made therein, or in the notes since their execution. The defendant relies upon his own testimony, and that of his son, Dennis Kennelly. They were both present when the note and mortgage were signed, and the son signed his father's name to the note and mortgage by his direction. Steele testified that the son read them over to the father, and signed his father's name, as directed. Both the father and son testified that the mortgage did not contain the homestead at that time, and that it was the agreement between the parties that the mortgage was to be on the twenty acres only.

The cause was tried upon depositions, so that it was presented to the court below precisely as it is in this court. We suppose that the court held that the alleged alteration was established, because there were two witnesses against one; and if the question were divested of other facts and circumstances proper to be considered, we might be inclined to concur in this view. But it is to be remembered that the defendant is making an attack upon the integrity of a written instrument, acknowledged and recorded. Not only this, but, to make the defense complete, the defendant's son thought it necessary to impeach the note by testifying that it had been altered by inserting

the value of the land as nine hundred dollars. And then again the fact is to be considered that, if this defense be true, either S. K. Steele, who made the loan, or the plaintiff, committed a felony by the alleged alteration. Steele testified that he looked up the records of the title of the land before he made the loan, and that he told defendant he would not make it on the twenty acres. Another most important fact is that it is not claimed that either the note or mortgage gave the appearance of having been changed, and surely Steele did not intend to take insufficient security for the money, and he knew, and the fact that this defense was made is strong evidence showing, that the twenty acres is no security. As we view the facts, there should have been a decree for the plaintiff foreclosing the mortgage upon both tracts of land. REVERSED.

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THE STATE OF IOWA, Appellee, v. MYRON E. BILLINGS, Appellant.

1. **Murder**: CIRCUMSTANTIAL EVIDENCE: NEW TRIAL. The deceased, with whose murder the defendant was charged, was found in his office fatally wounded from a pistol shot, the wound and burned condition of the nose and eyelashes indicating that the pistol when discharged must have been placed with the muzzle against the face and under the eyebrow, and the situation of the revolver being such as it might naturally have been if discharged by the deceased himself. But two shots were fired, being about four and one-half seconds apart, both of which were from the revolver found by the side of the deceased; and but two balls were ever discovered, one in the head of the deceased, and the other in the back of defendant. The deceased was a man of good physique, in the vigor of his physical manhood, and capable of preventing a deadly assault with a revolver placed against his face. *Held*, that the undisputed facts in the case being inconsistent with murder, but consistent with suicide, the burden was upon the state to overcome the presumptions arising from such facts with affirmative proof of the guilt of the defendant, and that, the state having failed to do this, a verdict of murder in the second degree was erroneous.

2. ———: ———: ———. The trial judge in announcing his reasons for overruling the motion for a new trial stated, that if he were the jury trying this case he should render a verdict of not guilty; that it was possible that the defendant shot the deceased, but not probable; and that he thought, if there were no appeal, he should set the verdict aside. The remarks of the judge were, at his direction, taken down by the reporter, and were made a part of the record. *Held*, that the record sufficiently indicated that in the opinion of the district court the verdict was not supported by the evidence, and it was its duty, therefore, upon that ground, to have granted the defendant a new trial as provided by law; and that, having failed to do so, its judgment should for such reason be reversed, independent of the views of the supreme court of the sufficiency of the evidence to sustain the verdict.

Appeal from Black Hawk District Court.—HON. JOHN J. NEY, Judge.

TUESDAY, OCTOBER 14, 1890.

THE defendant was indicted for the murder of Willis S. Kingsley on the twenty-first day of December, 1887, in Bremer county. The indictment was tried in Bremer county in 1888, and a verdict was returned of murder of the second degree, and from the judgment thereon, of life imprisonment, the defendant appealed, and the judgment was reversed, and a new trial ordered. The venue of the case was changed to Black Hawk county, where the case was again tried, with a like verdict and judgment, and the defendant again appeals.

W. L. Eaton and *C. Wellington*, with *M. E. Billings*, *pro se*, for appellant.

John Y. Stone, Attorney General, *C. W. Mullan*, County Attorney, and *E. A. Dawson*, for the State.

GRANGER, J.—I. Willis S. Kingsley was, on the twenty-first of December, 1887, an attorney at law, and county attorney for Bremer county. His office was in the city of Waverly, on the north side of Bremer avenue. It consisted of two rooms, being a front and rear room, connected

1. MURDER: circumstantial evidence: new trial.

by folding doors. These rooms were on a second floor, with a door leading from each to a hall and stairway. On the same floor, in the rear of the office, were two rooms occupied by Dr. C. P. Byers. About six o'clock on the evening of December 21, 1887, Kingsley was found in a dying condition on the floor of his office, lying just inside the rear room, with his head against one of the folding doors, partly opened, and in such manner that his head was pressed forward till his chin was rested on his breast. When found he was alive, but unconscious, and died in a few moments, and without regaining consciousness. Soon after being discovered, the body was so moved lengthwise as to avoid the cramped position, and allow the head to rest on a cushion on the floor. The right arm lay along the right side on the floor, somewhat bent, so that the hand was near the hip, the fingers being also slightly bent. Between the hand and the hip, with the barrel somewhat under the hip or thigh, lay a revolver, from which two shots had been fired, one of which caused the death of Kingsley. The ball had entered the head of Kingsley near the junction of the right nasal and frontal bones, at a point spoken of as the "inner angle of the right eye." On a chair in the front room of the office lay the overcoat of the defendant, in one pocket of which was an unloaded revolver, which had not been discharged on that occasion. But two shots had been fired, and both from the revolver lying by the side of Kingsley, and there were about four and one-half seconds of time between the two shots. Immediately after the shots were fired, the defendant came from the stairway leading to Kingsley's office, with the remark: "I'm shot, and I have the papers to show why. I am shot. Kingsley has shot me, and I want some one to help me." An examination disclosed a hole through the back of the coat, vest, shirt and undershirt of the defendant, and that the ring connecting the lower and upper parts of the suspenders was broken, the suspenders separated, and a revolver ball, somewhat flattened, was impressed upon and adhered to the suspender ring. Directly over the

spinous process, and about on a line with the lower ends of the shoulder blades, was a slight wound about the "size of a three-cent piece," and slightly swollen.

It may here be stated that the testimony as to the killing is entirely circumstantial. No living person, barring the defendant, has positive knowledge of the facts. For some time just prior to the killing the defendant was in the office of Kingsley, and Dr. C. P. Byers, who was in the adjoining office, heard loud words, and, stepping to his door, overheard some parts of an altercation, and his is the only testimony of a third person of what occurred at that time between defendant and Kingsley. The following is a part of his testimony: "The first words I heard of the conversation was an order to 'Get out of my office.' That order was made by Kingsley. These are the words I heard: 'I want you to get out of my office.' Don't think I heard any reply to that order. I went to the door and opened it partially, and stood there. Then I heard that order repeated. Heard it repeated a good many times. Heard Billings reply in answer like this: 'That he wasn't going out.' I think he said: 'I am not going out.' Then I heard a movement in Kingsley's office. Think Billings said he came to have a talk. Think Kingsley repeated the order to 'Go out,' but Billings said he would not go out; that he had come to have a talk. Heard Kingsley say next: 'You darned old stinker, you have been trying to work up a scheme on me, and I want you to get out.' Don't think I heard any reply to that. I think Kingsley repeated that order. I think after that the door opened suddenly, and closed with a bang. Think it was Kingsley's door to front office. I then heard Billings open the conversation with something about his wife. That was all I understood of that. Then he said something about some 'beastly act.' In reply to that I think Kingsley said: 'Do you mean to accuse me of that, or say that I did that?' And Billings said: 'I said nothing of that kind.' I understood no more of the conversation. I heard the sound of voices going on in a conversation,

but couldn't understand it. That continued quite a while. I heard Billings say that, 'When I returned, it was with the intention of blowing your brains out, but something prevented me, or changed my mind.' Did not hear Kingsley make any reply to this. Do not remember hearing any further conversation that I could understand. This conversation went on quite a while after that. After that I heard two sharp reports. They sounded like pistol shots. Thin I stood at my door with it partially opened when I heard the first shot. Think my door was open more than a foot. I could see straight ahead, out of my door into the hall. The door latched on the north side, and swung in the room to the south. Think I was standing at the door, with my hand on the knob, with the door open about a foot, when I heard the first pistol shot. It sounded in the front part of the building. I can't recollect whether I heard the door of Kingsley's office open at any time after the time I heard it open and close with a bang. I did not see any flash or light of a pistol shot in the hall. I heard another pistol shot following that one. Think I heard the second shot about four seconds after the first shot." The witness now here claps his hands together four times. The reporter times witness while he claps his hands four times. By the reporter: "I got it four and one-half seconds." It is stipulated by the attorneys for the defendant, and also for the state, that the reporter found the time to be four and a half seconds. Witness: "Think I was standing in the same place at the time I heard the second pistol shot as I was when I heard the first shot. I was standing inside of the door, looking into the hall. I don't remember of hearing any door in Kingsley's or in that building open and close between the time of the first pistol shot and the second pistol shot. At the time that I heard the second pistol shot I did not see any flash or light of a pistol shot either in the hall or upon the stairway. I have no recollection now of hearing anyone come out of Kingsley's office and step up on the hall or go down the stairs before the time that I

heard the second pistol shot. Following the second pistol shot, I heard the falling of a body. It sounded as though a very heavy body fell upon the floor. This occurred immediately after I heard the second pistol shot."

The defendant had contemplated, or at least prepared, some papers, looking to a criminal prosecution of Kingsley for the seduction of one Emily Shane, and he either believed, or professed to believe, that there had been criminal intimacy between his wife and Kingsley; and defendant's mission to the office of Kingsley on the night in question was with reference to one or both of these matters.

On the person of defendant, when he came from the office of Kingsley, was an envelope containing papers, which we need only briefly describe. Exhibit 13 is in the handwriting of the defendant, and is as follows:

"WAVERLY, IOWA, 1887.

"*M. E. Billings, Attorney:*

"I herewith deliver to you my notes as follows: Three hundred and sixty dollars due in equal monthly installments in 1888; two hundred and forty dollars due in equal monthly installments in 1889. Fourteen notes, for twenty dollars each, due in equal monthly installments or one each year from 1890 to 1903, inclusive. Also a chattel and real-estate mortgage to secure the same. Also an assignment of same amounts per month, as in notes of my salary as county attorney, to further secure the same. Said notes being for damages occasioned by my seducing and debauching the lady who was of irreproachable character."

This paper was without signature, and there were also notes, a real-estate and a chattel mortgage, unsigned, with dates for payments, and amounts to correspond with the assignment (Exhibit 13); also an information charging Kingsley with the crime of adultery with defendant's wife, with the name of Delia E. Billings as informant, and sworn to before M. E. Billings as notary public. This was in the handwriting of defendant, and

the name of his wife affixed thereto without authority; also an information charging Kingsley with the crime of seduction, with Emily Shane as informant, and sworn to before M. E. Billings; the information, except signature, being in his handwriting. On the back thereof was the indorsement: "A. T. Brown, for the prosecution." On the person of the defendant were also the following papers: A purported letter of confession, with Mrs. Billings' name thereto, and addressed to "Wronged and ruined husband." The letter is a confession of criminal intimacy with Kingsley, and contains an elaborate statement of facts and circumstances, disgusting, and, if true, deplorable. It is in part a statement of what defendant says was a verbal confession of his wife to him, and a part, he says, was to serve as a decoy for Kingsley, and is not claimed to be true, and was written by the defendant without the knowledge of his wife. Also a paper purporting to be an affidavit on affirmation, by M. E. Billings before D. T. Gibson, a notary public, detailing facts of his observation, showing, if true, almost conclusively, a criminal intimacy between his wife and Kingsley; also his wife's statements to him of her criminal conduct, and other matters. To this affidavit the signature of the affiant was placed by defendant without authority; also the body of an affidavit purporting to be that of a "friend" of defendant without signature or the name of the affiant appearing elsewhere. It was written by defendant, and an unsigned jurat fixes the date "twenty-first day of December, 1887." Its recitals are, that the "friend" personally witnessed criminal intimacy between defendant's wife and Kingsley, August 6, 1887. Other papers found on the person of the defendant it is not important to notice.

A principal purpose on the part of the state by these papers, and of much other testimony, as to a claimed intimacy of Kingsley with Emily Shane and defendant's wife, was to show a motive for the commission of the crime charged, it being the theory of the prosecution that the charge of criminal intimacy is

false, and that defendant wickedly conceived a purpose to extort from Kingsley, by way of obligations, his property, both present and prospective, or take his life. On the other hand, the theory of the defense is that the charge of intimacy is true, and that Kingsley, being confronted by Billings in person with the charge, as the result of an altercation that followed, made the assault, and, as Billings was fleeing down the stairway, fired what he supposed to be a fatal shot, and, in a moment of desperation, prompted by the situation, involving his character, family, friends and future, put an end to his existence. As this theory involves motives for so desperate an act, it should be stated that, in the left hand of Kingsley when found, in his own handwriting, crumpled, tightly clenched, and blood-stained, was the following unfinished letter:

"BREMER COUNTY, IOWA.
"Office of W. S. Kingsley, County Attorney.

"WAVERLY, December 21, 1887.

"*Samuel E. Sprague, Esq., Des Moines, Iowa.*

"DEAR SPRAGUE:—You will excuse this letter at this time, but I am now in a very swearing mood, and I am going to tell you what the reason thereof is. You will remember, I think, what I told you about the trouble I was having with that old cuss of an attorney that moved out of my office the day you was here. You remember, do you, what I said about how I locked the door on him, and also that when I went to dinner that I locked the south door of my office from the inside, and went out of the north door, so that he could not get in while I was at dinner? Now, Sam, if you do, I want you to help me out by a statement to that effect. That old son of a b——h has got up a most damnable black-mail on me, and has given publicity to it, and I am getting the better of him, and it's causing quite a stir here in social and business circles. He became offended at my turning him out of my office, and has now claimed that he came to my office several times, and found the door locked, and that I was having fast

women there for unlawful purposes, and I want to show how the door came to be locked, and, if you can give me your hand on the matter, I can squelch his attempt, and that most successfully, too. The old cuss has run out here, and is going to leave the city,—utter failure indeed,—and that's what he is doing it for, as he is going to go to Cali—"

In Kingsley's pocket was found a letter in pencil, in the handwriting of defendant, dated December 21, 1887, signed "D." It is addressed to W. S. Kingsley, and speaks of the writer as an expectant mother, and of Kingsley as the father. It asks for twenty-five dollars. Says she is going to her mother, and will "get rid" of the child; that she has written a long confession which she will leave for "N." (defendant), and will kill herself if she does not get away that day. It is not claimed that Mrs. Billings knew of this letter. It is what defendant calls a "decoy," designed to obtain a confession from Kingsley. The letter contains other statements which we do not recite. In his pocket was also an affidavit of Emily Shane, dated December 15, 1887, containing an explicit denial of any improper conduct or intercourse between herself and Kingsley, and also statements that any affidavit in the possession of M. E. Billings or others, to the contrary, is false, and that her signature thereto was obtained without her knowing the contents.

There is a large amount of evidence on both sides designed and tending to influence, modify or change the natural or reasonable inference to be drawn from the possession of these papers by both defendant and Kingsley, which cannot be made to appear; and, with reference to the question of motives, we have no difficulty in concluding, in the light of investigations, both judicial and otherwise, that murders and suicides have often been induced by motives less powerful. In argument to us, orally, counsel for the state dwelt mainly on the evidence and facts showing motives, and the depravity of the defendant, as a ground for belief in his guilt, while the other side contended that

the circumstances immediately surrounding the death precluded a reasonable belief that the defendant fired the fatal shot, and also that the record shows affirmatively that such was the judgment of the district court; and it is to these contentions of appellant that we devote our attention, for the record presents no other ground on which we could reverse the judgment.

The defendant was not a witness on the last trial. At the coroner's inquest he was present, and made an elaborate statement of what transpired in Kingsley's office, and with regard to the papers found on his person; and the state, on the last trial, put his statements in evidence. We are not disposed, in our consideration of the case, where not corroborated, to attach to those statements importance, except as against the defendant, for several reasons, and among them, *first*, that his admissions in the case, and the undisputed facts, so involved his character for veracity as to make his statements, uncorroborated, of little worth; and, *second*, that the facts to serve as a basis for our conclusions must, in the main, be unquestioned. These facts, in brief, are that Kingsley was found in his office fatally wounded by a pistol shot; that beside him lay the revolver from which the shot was fired, and in the position that it might naturally have been if discharged by himself; that the pistol, when discharged, must have been placed with the muzzle against the face, and under the eyebrow, as evidenced by the eyelashes being burned, and the nose burned and powder-stained below the wound, and the eyebrow and face above the wound being unaffected; that he was a man of good physique, in the vigor of his physical manhood, and, if observing, capable of, and prompted by the law of self-preservation, would have prevented a deadly assault with a pistol placed against his face; that such a position for a revolver is a natural one for a person committing suicide, and unnatural for one taking the life of another, even in the absence of anticipated resistance; that but two shots were fired, and but two balls have ever been discovered—one in the head of Kingsley, and one against

the back of the defendant; that it is inevitable that both shots were fired by the same person, and by either Kingsley or the defendant; that immediately preceding the tragic occurrence, and connected with it, was an altercation involving charges against Kingsley, so grave and important to the parties, as from their truth or falsity, and the provocations of the moment, to serve either as a motive for the taking of human life.

With these undisputed facts, uninfluenced by others, the verdict of all men would be that the shots were fired by Kingsley. They would not sustain a verdict against the defendant, even on the basis of a probability. We must then look to the theory and claims of the prosecution to so change the force of such facts that the verdict against the defendant may have support in the evidence beyond a reasonable doubt. The prosecution says, as to the ball against defendant's back, that it was a simulated affair, adjusted by the defendant as part of his plan to obtain Kingsley's signature to the papers in his possession, or take his life. As to the shots, its theory is that the first shot was a blank cartridge,—that is, a cartridge with powder and no ball, to harmonize with the plan of adjusting the ball on the suspenders, and that, after firing the second and fatal shot, he placed the revolver beside Kingsley, and made his escape from the office to the sidewalk. If we concede that degradation on the part of the defendant, which is a necessary accompaniment of a purpose to murder for personal gain only, there still remains to his credit an adroitness and cunning both for conception and execution very difficult to believe. The adroitness is not so much in discovering the salient features of the plan as in perceiving, in advance, the situation necessary to execution. It is less difficult after execution, with the facts known, to theorize upon the designs and purposes of another, than to, in advance, plan for the execution, to obtain which certain conditions must be; and the particular facts of this case afford a fitting illustration. We have said, and it will

not be questioned, that the proximity of the revolver to the face when discharged, and the marks upon the face, are indications of suicide; and the plan ascribed to the defendant is to mark his pathway with such evidence. It is his plan, then, to first fire the blank cartridge, which is to be evidence to those who may hear, but cannot see, that Kingsley fired the ball against his back, and then to place his revolver so close to Kingsley's face or person that the discharge will be evidence of suicide. Who would believe, in advance, that such a plan could be executed? The first shot would serve to put Kingsley on his guard, and, with four and one-half seconds between the shots, the chances are greater that the second shot would not have been fired by defendant, than that the revolver would have been put against Kingsley's face in a deadly assault. Of course, we should not treat the case as if no part of the execution could have been the result of momentary impulse, or as prompted by the situation as then seen, and we design to attach particular importance only to those matters which must have been anticipated, if the theory of the prosecution is true; and, if it be said that the particular time between shots might not have been calculated in advance, it still remains that to cock such a revolver by raising the hammer with the thumb, and make such an assault, would, of necessity, consume about that time; and if the theory is divested of any consideration as to time, and what might naturally occur to defeat the purpose, it must fall of its own weight. It fails to recommend itself for candid consideration. The only aid claimed for this theory in the testimony is the enmity of defendant towards Kingsley, his diabolical scheme to extort money from him, as evidenced by the papers in defendant's possession at the time, and his threats to take the life of Kingsley. But these considerations do not reach the question of the impracticability of the theory by which the prosecution seeks to avoid facts which, unavoided, practically acquit defendant of the crime.

The case, in this connection, is quite peculiar in this, that the state must, in the course of its prosecution, concede or establish a state of facts inconsistent with murder, but consistent with suicide; such facts being entirely independent of the question of motive, and pointing directly to the act of killing. It must then assume the burden of such a showing as will avoid the presumptions arising from such facts, and show the guilt of the defendant. In this respect the state is confronted with an unusual and exceeding difficulty, because each has a motive for taking the life of the other, and the facts, barring those of a speculative character, show that the defendant was assaulted, and that Kingsley fell by his own hand. It is true that defendant threatened to take the life of Kingsley; but it is equally true that Kingsley had threatened to take the life of defendant. Their hatred was mutual, and Kingsley's provocation, if the accusations against him were false, was much the greater. Barring the facts that the defendant's depravity conclusively appears, and that of Kingsley does not, we think the case is without a reasonable doubt that Kingsley fired the fatal shot. While such depravity as shown by the record is a proper element to be consided in determining the guilt of the defendant, it is not shown to be of a murderous character, and certainly cannot override the affirmative facts that point to his innocence of the crime charged. For other offenses he is not on trial.

The theory of simulation for the wound on defendant's back, and the ball on the suspenders, standing alone, is not conclusively contradicted by reason and the probabilities of the case, but it is to a great extent; and associated, as it must be, with the entire transaction, it really has nothing for its support. It is especially urged in this connection that the holes through the clothing are out of the necessary positions to support defendant's claim that the ball was fired against him. Defendant and the clothing were before us at the trial, the clothes placed on him, and some of the members of the court placed him in the position he claims

to have been in when wounded; and, considering the direction from which the ball would come, the experiment, in illustration of the evidence, to a great extent avoids the force of the objection.

There are many items of evidence, both for and against the theory of the state, that we cannot in an opinion notice, nor is it important that we should. Much attention has been given to the time between the last shot and the time defendant was on the walk below, and it is urged that it was too short for defendant to have adjusted the revolver and made the distance. If this was the only ground upon which the claim for a new trial was based, we should refuse it, because we think the accomplishment possible in point of time under the evidence, when we know the distance made by other parties between the report of the pistol and appearance of defendant on the walk. We should not overlook a fact of much significance to us, and that is the testimony of Dr. Byers. He heard but parts of the altercation in the office of Kingsley, but such parts as he did hear were, to some extent, corroborative of the statements of defendant before the coroner as to what occurred. He fixes both doors leading from Kingsley's office to the hall as shut, but he says he heard both shots, and that the first report was the louder. There is no fact to show why the first was the louder, if both doors were shut when both shots were fired. If, on the contrary, one shot was fired at the head of the stairs in the hall, it would have been louder to him than would have been the second, which was surely fired in the office, for he was standing at his open door, looking into the hall, and from the stairway to him the way was direct and open, while from the office the way was indirect, and the sound would have been obstructed by partition walls. It is true that Mr. Byers afterwards said when recalled and his attention directed to the fact of the first shot being louder: "I will just change that a little because the door must have been open." But in that case no different inference would follow, because

then the door was open when both shots were fired, for it would not be claimed that, in the four and one-half seconds between the shots, the condition of the doors was changed. If the door was open when both shots were fired, there is still no reason for the first being louder, unless it was fired in the hall.

The problem to demonstrate the truth as to Willis S. Kingsley's death will probably never be solved. He was, for a time, an associate with, and a boarder at the home of, the defendant. The future may yet reveal the truth as to his guilt or innocence of the crime imputed to him, of invading the sanctity of the defendant's home. Upon the face of the record we should exculpate him. The loathsome record made for themselves by his accusers excludes belief in their statements wherever not corroborated; but this does not convict the defendant of a crime which the state must establish by proof. And here we incline to think is to some extent a secret of the adjudications of this case. Kingsley is dead; the defendant was believed to be a bad man, and such facts were allowed to prevail where affirmative proof of facts were required.

II. We are to consider another question of great, if not controlling, importance in the case, and incidentally to the same point. The district court, in passing upon the motion for a new trial, gave quite extended reasons for its rulings, and ordered them to be made a part of the record for our consideration. We do not set out the comments of the court entire, but will in part. The court commenced by a statement: "If I were the jury trying this case, I should render a verdict of not guilty from the evidence introduced here." It comments on the condition of Kingsley's face; the position in which the revolver must have been placed; the position of the revolver beside Kingsley; the ball and wound on the back of defendant, and the holes in the clothing; and concludes that they "point rather to an assault on Kingsley's part, and subsequent suicide, than they do to Billings' murder of Kingsley."

2. THE same.

The court then comments on the charge against Kingsley by defendant, and the course of the defendant in regard to it in preparing the papers, and speaking of the letter of confession it says: "Billings pretends to have discovered an intimacy between Kingsley and his [Billings] wife. He does not act the part of an injured husband. He does not appear indignant and furious; but, like a slimy viper, gets up a story—a confession—that shows a mind given over to evil intentions. That confession came from nobody but a man of vile and bad mind." Again the court said: "If that confession was out of the case,—if Billings did not appear in the light he does, by reason of that confession, * * * I would have set aside the verdict as quick as it was rendered." The court afterwards states its conclusions as follows: "It is possible, and barely possible, that he might have shot Kingsley. It is within the possibilities. It is not probable. I don't think it is probable. I think these are improbable facts. I think it is improbable that the holes in the clothing were simulated. I think it is improbable he could have shot Kingsley, and hid the revolver as it was found after Kingsley's death. I think these things are very improbable. And the wound on Kingsley's head indicates the position of the revolver which seems quite improbable to my mind. But the jury has found a verdict upon these facts. I don't feel at liberty to set it aside. * * * But I am willing to have my sentiments and my views of this testimony go on record, and appear in the supreme court on his hearing, that he may have the benefit of it, and that the supreme court may view the testimony presented to them there in the light of my opinion of it here. If they see fit to set aside the verdict, all right. I think, perhaps, if there was no appeal that I should set it aside. * * * The vileness of this confession * * * stands in the way of my interfering with the verdict here."

Appellant urges that the record shows the judgment of the district court to be, that the verdict is not sustained by the evidence. Counsel for the state, on

the contrary, urge that we take notice of nothing but the order overruling the motion for a new trial. It is certainly a new and novel question in this state, and we are cited to no precedent as a guide. It is not a matter of impeaching a record by extrinsic evidence, for no question is made of the correctness of the record, and the court would surely have the right to make of record facts occurring on the trial that would tend to show the validity of the judgment. The law makes it the duty of the district court to grant a new trial in criminal cases whenever the verdict is not sustained by the evidence. Code, sec. 4489. It means, of course, whenever, in its judgment, such is the fact, for otherwise the statute would be of no avail. And, in criminal cases, whenever, in the judgment of the district court, a new trial should be granted, and in obedience thereto the order is made, it is conclusive in the case, and this court cannot disturb the order. If the state appeals, and this court concludes that the district court erred, it may so state, but it cannot reverse the judgment. Code, sec. 4539; *State v. Kinney*, 44 Iowa, 444. Hence, the legislative intent, as to the power of the district court in criminal cases, is that the court may reverse its judgment for errors against the defendant, but not in his favor. The mistake should not be made of attributing the reason of the rule in cases like this to constitional guaranties, because we are not dealing with a case in which there is an acquittal, or in which to again place the defendant on trial would be in violation of his constitutional rights.

Having then in view the authority the legislature designed the district court should exercise, we may inquire as to the effect of the record in this case. Barring the final entry by which the motion for a new trial is overruled, and the judgment of the district court—by which we now mean its convictions—is not open to question. It is not questioned to us in argument. There is not a single conclusion in the opinion of the district court favorable to the verdict. It allows it to rest only on a bare possibility. To a valid judgment the law

requires, *first*, that there shall be a verdict upon evidence to satisfy the minds of the jury beyond a reasonable doubt; and, *second*, that the judge who presides at the trial shall believe that the evidence is sufficient to justify the finding. An affirmative showing of a want of either surely avoids a judgment; and, if we may consider the entire record before us to know such facts, the result is not in doubt. It is quite difficult to read the record and avoid the belief that the district court thought, considering the magnitude of the case, the great expense of new trials, and the probable conclusiveness of the opinion of this court upon the sufficiency of the evidence, that it would be better to make an order from which an appeal could lie for the purposes of the case, than to enter a judgment, which, even if erroneous, could not be reversed, and thus compel the parties to accept its judgment. The motives, if such they were, from other points of view, may have much to commend them, and will doubtless hasten the final result of the case. They are, however, without support in the law.

That the district court was thus influenced is evidenced by many expressions in its opinion, but especially when it says, speaking of the verdict: "I think, perhaps, if there was no appeal, I should set it aside." From the record as made, we are led decidedly to the conviction that it was the judgment of the district court, as a result of its consideration, that the evidence was not sufficient to sustain the verdict. With this fact apparent of record, is there anything in the law to prevent our overruling a judgment based thereon, and in conflict with it? If so, it is the shadow, and not the substance that is of controlling force, and such a conclusion must be sustained at a sacrifice of the very essence of judicial inquiry,—the truth. It is a reasonable rule, and one having general support in adjudications, that the effect of a record is to be determined from its consideration as a whole, and that dependent portions thereof must yield a conformity to those on which they depend. If a jury should return a verdict

that "from the evidence we believe the defendant not guilty, but we return a verdict of guilty," a judgment of conviction would not lie, because not in conformity with the actual findings, but a judgment of acquittal would, because based on the belief of the jury from the evidence. The illustration may not, in every sense, be a parallel, but it is kindred in its nature, and shows that courts do not allow actual facts to become subservient to mere forms, and that the convictions of the mind, when properly known, will override a work of the hand that merely notes an unsupported conclusion. We regard such a rule as applicable to the facts under consideration, and conclusive of the case, independent of our views as to the sufficiency of the testimony to sustain the verdict.

On the former trial in this court, we did not discuss the value of the evidence, as other errors necessitated a reversal, and the arguments then were entirely, as they now are, mainly, oral; and between the submission and the determination of the case, the *personnel* of the court to some extent changed. Besides, if the case was to be reversed on other grounds, it seemed advisable to not embarrass another trial with our view of the facts and the evidence, as in the event of a change in the testimony, which often occurs on a second trial, our comments might be given undue weight. As after a second trial we may reasonably conclude that the facts on which the state relies for a conviction are fully presented, and that the state may properly determine the propriety of further prosecution, we have announced our views as to the sufficiency of the evidence to sustain a conviction. Our conclusion in this respect is in harmony with that of the judge who presided at the trial, and gave to the testimony long and patient attention, with many added opportunities to know its value, and because of this we are less reluctant to interfere with the verdict, because of a want of evidence, than we otherwise would be under a well-known rule as to caution in such cases.

These considerations make our duty plain, and the judgment of the district court is again REVERSED.

P. H. THEISSEN, Appellee, v. THE CITY OF BELLE PLAINE, IOWA, Appellant.

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1. **Negligence**: PERSONAL INJURY: EVIDENCE: PRACTICE. Where, in an action for personal injury, the close of plaintiff's testimony left a conflict in the evidence upon the question of negligence on the part of the defendant, and that of the plaintiff's freedom from contributory negligence, *held*, that the case should be left to the jury to decide, and that a motion, at such stage of the case, to instruct the jury to return a verdict for the defendant, was properly overruled.

2. ——: ——: NOTICE. The accident resulting in injury to the plaintiff occurred between ten and eleven o'clock at night, and was caused by the removal of a barricade before an opening in the public sidewalk of the defendant city between ten o'clock of the same evening and the time of the accident. *Held*, that the facts did not warrant a presumption of knowledge on the part of the city of the removal of the barricade prior to the accident, and that, in the absence of evidence that the city had caused its removal or had actual notice thereof, it was not guilty of negligence.

3. ——: ——: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. In an action for damages for a personal injury sustained through the alleged negligence of another, an instruction to the jury that, to entitle the plaintiff to recover, he must show himself to have been free from negligence that *proximately* contributed to the injury, is not improper.

Appeal from Benton District Court.—HON. J. H. PRESTON, Judge.

TUESDAY, OCTOBER 14, 1890.

ACTION to recover damages for personal injuries sustained by falling into an opening in one of the public sidewalks of the defendant city, because of the alleged negligence of the city in not repairing said walk, and in not adequately protecting those using the same from falling into the opening therein. There was a trial to a jury, resulting in a verdict and judgment for plaintiff. The defendant appeals.

J. J. Mosuat and *T. H. Milner*, for appellant.

Whipple & Sells and *George C. Scrimgeour*, for appellee

GIVEN, J.—I. At the close of plaintiff's testimony defendant moved for a verdict upon the grounds that the evidence showed plaintiff guilty of contributory negligence, and failed to show negligence on the part of defendant. The overruling of this motion is assigned as error.

1. NEGLIGENCE: personal injury: evidence: practice.

It appears, without conflict, that some days prior to April 30, 1888, the defendant city permitted a part of one of its public sidewalks to be and remain removed to facilitate repairs on an abutting building. By the removal, an opening was made in the walk dangerous to persons traveling along the same. Suitable guards were placed and maintained around the opening up to the evening of the night that plaintiff was injured. There were two routes equally distant and convenient between the plaintiff's home and place of business; one being by the walk in question. Between ten and eleven o'clock on the evening of April 30, 1888, the plaintiff, while walking along the sidewalk in question, from his place of business to his home, fell into the opening and received the injuries for which he seeks to recover. He knew of the opening, and of the manner in which it had been inclosed for several days prior to the accident. He testified, that he took that road instead of the other because he was carrying a sum of money; that tramps were around that evening; and that he was more likely to encounter them by the other road, as it led past the railroad depot, and, going as he did, he had the company of two neighbors part of the way home. He also testified that the night was so dark he could not see anything, and that he had his hands out feeling for the boards that inclosed the opening when he fell in, and that there was only one board across the opening at the west end where he fell, which was the lower board, and over which he tripped. Taking the testimony as it

stood when this motion was ruled upon, there was clearly such conflict upon the question of negligence of each party as to entitle the parties to have the same decided by the jury. It was for the jury to decide whether, under the facts and circumstances, either party was guilty of negligence. There was no error in overruling the motion. *Whitsett v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa, 150.

II. As already stated, it appeared without conflict that up to the evening of the accident the opening in the walk was sufficiently barricaded. The knowledge of that fact is relied upon as justifying the plaintiff in going that way. The testimony of Mr. Elliott, the mayor, and others, that the planks were in position across the west end of the opening at ten o'clock on the night of the accident, is not necessarily contradicted by the statement of plaintiff and others that the top plank was gone when he fell in the opening. But one conclusion can be reached from the testimony, and that is, that between the time Mr. Elliott left the place, and the time of the accident, the upper plank had been removed, and that the accident occurred because of such removal. The city was not guilty of negligence unless it caused the removal of the upper plank, or had notice of its removal, or such time had elapsed as that it may be presumed to have known of its removal. There is no claim that the city caused the plank to be removed, nor that its officers had any knowledge of its removal. The time between the removal and the accident was, at most, less than one hour, and in the night. Surely notice cannot be inferred from such a state of facts. Appellant's motion for new trial should have been sustained upon the grounds that the plaintiff failed to show that the defendant was guilty of negligence as charged.

2. —: —: notice.

III. Appellant complains of the use of the word "proximately" as found in the fifth and seventh paragraphs of the charge to the jury, and refers to *Parkhill v. Town of Brighton*, 61 Iowa, 103, wherein the court says, that "the

3. —: —: contributory negligence: instructions.

language used is proper enough in a legal treatise of judicial opinion, but is not to be commended in an instruction to a jury. The giving of the instruction cannot, perhaps, properly be assigned as error." The reason for this remark does not now apply with the same force, because of the frequency with which the term is employed in legal proceedings, and the more general understanding of its meaning. The instructions under notice were plain and easily understood.

It follows from the conclusion already announced that the judgment of the district court must be REVERSED.

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THE STATE OF IOWA, Appellant, v. J. L. MAHAN, Appellee.

1. **Adultery**: UNMARRIED PERSON. An unmarried person may be guilty of the crime of adultery, and punished therefor under section 4008 of the Code.

2. ——: INDICTMENT. An indictment for the crime of adultery may be good although it does not show that the prosecution was commenced upon the complaint of the husband or wife of the accused, nor that the latter is unmarried. If the defendant in such case is married, that fact should be pleaded as a defense.

Appeal from Clinton District Court.—HON. W. F. BRANNAN, Judge.

TUESDAY, OCTOBER 14, 1890.

THE defendant was indicted for the crime of adultery. A demurrer to the indictment was sustained, and the state appeals.

John Y. Stone, Attorney General, and *A. R. McCoy*, for the State.

No appearance for appellee.

ROBINSON, J.—The body of the indictment is in words as follows: "The grand jury of the county

of Clinton, in the name and by the authority of the state of Iowa, upon complaint made and prosecution commenced, by Arthur E. Bicknell, husband of Grace E. Bicknell, accused J. L. Mahan of the crime of adultery committed as follows: The said J. L. Mahan. on the fifteenth day of April, A. D. 1888, in the county aforesaid, did, wilfully and feloniously, have sexual intercourse with Grace E. Bicknell, a married woman, who was not his wife, the said Grace E. Bicknell being then and there a married woman, and the wife of said Arthur E. Bicknell."

I. The indictment was found by virtue of section 4008 of the Code, which is as follows: "Every person who commits the crime of adultery shall be punished by imprisonment in the penitentiary not more than three years, or by a fine not exceeding three hundred dollars, and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties, only one of whom is married, both are guilty of adultery, and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife." The complaint must be made by the husband or wife of the person accused of the crime. *Bush v. Workman, Sheriff*, 64 Iowa, 205. But an unmarried person may be guilty of the crime and punished as provided by the section quoted. *State v. Wilson*, 22 Iowa, 364. The indictment was evidently drawn upon the theory that the husband of the woman with whom the adultery was committed was the proper person to make the complaint, but the error does not vitiate the indictment. The allegation in regard to the complaint of the husband is immaterial, and may be treated as surplusage.

1. ADULTERY: unmarried person.

II. To constitute the statutory offense it is necessary that at least one of the parties to the act of sexual intercourse be married, and both may be. *State v. Roth*, 17 Iowa, 336. The indictment in this case shows that defendant had wilful and felonious sexual intercourse with a woman who was the wife of another. It, therefore, shows that the crime of

2. ——: indictment.

adultery was in fact committed by defendant. Had he been a married man it would have been essential to the success of the prosecution that it should have been commenced on the complaint of his wife. If the indictment had shown that he was married when the prosecution was commenced, it would have been necessary for the state to show that it was commenced on the complaint of his wife. *State v. Henke*, 58 Iowa, 457.

And, when the indictment shows that the defendant was married at the time the prosecution was commenced, it should allege that the prosecution was commenced on the complaint of the husband or wife. Such an allegation is necessary to show that the court has jurisdiction to try the case, for the reason that an indictment must show on its face that the offense which it charges is triable in the court to which it is returnable. Code, sec. 4305.

But the question raised by the demurrer in this case is, whether it is necessary, when the indictment does not show that the prosecution was commenced on the complaint of the husband or wife of the defendant, that it should show that the defendant was not married when the proceedings were instituted. In considering this question it must be remembered that the complaint required by the statute is not an element of the crime. *State v. Donovan*, 61 Iowa, 278. The indictment discloses no fact from which the marriage of defendant can be inferred. We are not justified in presuming that he was married when these proceedings were commenced. The indictment shows that defendant committed the crime of adultery, and that his guilt does not depend upon his state as to being married or single at the time of the act. Under these circumstances, if defendant was married, the failure of his wife to make complaint was a matter of defense, which he was required to prove in order to take advantage of it. It is not necessary to negative an exception made in a criminal statute, unless it adds a qualification to bring a case within it, which, but for the qualification, would be without it. *State v. Stapp*, 29 Iowa, 551; 10 Amer. & Eng. Enc. Law, 578,

and notes; Whart. Crim. Pl. & Pr., sec. 238; *State v. Conable*, *ante*, p. 60. We conclude that the indictment in question charged a complete offense, and on its face showed that the court below had jurisdiction to try it. The judgment of the district court is, therefore, REVERSED.

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SIOUX VALLEY STATE BANK, Appellee, v. MORRIS KELLOG, Appellant.

1. **Attachment**: PLEADING: VERIFICATION. The provisions of section 2672 of the Code, requiring that affidavits in verification of pleadings show the competency of the affiant to make the verification, are not applicable to affidavits made under section 2951 of the Code as the basis for the issuance of writs of attachment.

2. ——: LEVY: NOTICE. The failure of an officer executing a writ of attachment to give notice of the levy thereunder to the attachment defendant renders the levy invalid, notwithstanding an entry thereof in the incumbrance book.

3. ——: DAMAGES: NOTICE. Where the levy of a writ of attachment is fatally defective no damages are recoverable for the wrongful suing out of such writ, and, upon disclosure of such fact, evidence introduced under issues joined on the attachment defendant's counterclaim for such damages should be withdrawn from the jury.

4. **Evidence**: DECLARATIONS: AGENCY. Proof of declarations made by an agent in the course of his employment for the sale and lease of certain lands, that such lands had been conveyed to his principal in payment of a promissory note held by the principal against the latter's grantor, is not admissible in an action by the principal against the grantor for the collection of such note to show payment thereof.

5. **Trial by Jury**: PROOF: PRACTICE. Where the evidence produced in support of an issue in a cause is so deficient in proof thereof that a verdict thereon in favor of the party presenting the same would be set aside, the court may properly withdraw such issue from the consideration of the jury.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 15, 1890.

ACTION upon a promissory note. There was a judgment upon a verdict for the plaintiff. The defendant appeals.

Joy, Hudson, Call & Joy, for appellant.

Hubbard, Spalding & Taylor, for appellee.

BECK, J.—I. The petition declares upon a promissory note, of which defendant was a joint maker. The defendant alleges in his answer that he executed the note as the surety of his co-maker. An attachment was issued in the case, which was levied upon defendant's lands. The defenses pleaded to the action need not be here stated. The objections raised by counsel of defendant against the judgment will be considered in the order of their presentation in argument.

II. Defendant moved in the court below to strike the verification of plaintiff's petition, on the ground that, being made by the attorney for plaintiff, it fails to show that he had knowledge of the statements contained in the petition, thus showing his competency to make the affidavits. Counsel's position is based upon Code, section 2672, which, with preceding sections, provides for the verification of pleadings, and that subsequent pleadings shall be in a like manner verified. These sections are designed to restrict pleadings to matters of fact, and to prevent abuses arising from the pleading of fictitious defenses. The affidavit verifying the petition in this case was not made under the section of the statute cited by defendant's counsel, above mentioned, but under Code, section 2951, prescribing that the petition in an action wherein an attachment is sought must be sworn to; but it contains no provision like that found in the section cited by plaintiff's counsel, to the effect that the competency of the affiant must be shown in the verification. The motion to strike the verification was rightly overruled.

1. ATTACHMENT: pleading: verification.

III. The defendant pleaded as a defense, and set up as a counterclaim, that the attachment was issued without any just cause, and wrongfully, and that he sustained loss and injury by reason of the unlawful issuing of the attachment. The damages accruing therefor he seeks to recover in this action. The district court excluded evidence tending to support defendant's counterclaim, and withdrew it from the consideration of the jury. This action of the court was right, for the reason that the record shows that there was in fact no levy of the attachment. It is not shown in the record that notice of the levy of the attachment was given to the defendant. The return of the officer serving the attachment fails to show such notice. This court has held that, under Code, section 2967, such defect is fatal, and a levy is invalid in the absence of the notice required by this section. And this is so, though the supposed levy, as in that case and this, was entered in the incumbrance book. *First Nat. Bank v. Jasper Co. Bank*, 71 Iowa, 486.

2. —: levy: notice.

3. —: damages: notice.

IV. The defendant proposed to prove declarations and statements made by the cashier of plaintiff to the effect that certain lands were conveyed to plaintiff by the principal in the note in payment thereof. These declarations and statements were offered in evidence to support the defense that the note had been paid, and were made by the cashier while renting the lands, collecting rents thereon, or negotiating sales thereof. The evidence, we think, was rightly excluded. It will be observed that the admission and statements pertained to the issue involving the existence of the debt on the note and its payment. They were made while the cashier was transacting business concerning the lands, not business concerning the debt on the note. Now the statements of an agent will be received in evidence against his principal only when made touching matters of business which he is transacting when they are made, and which are in the scope of his authority. *McPherrin v.*

4. EVIDENCE: declarations: agency.

Jennings, 66 Iowa, 622. The controversy between the parties involves the question of fact whether the land was conveyed to the bank in payment or security of the debt for which defendant's note was given. There is no controversy as to the fact that the lands were conveyed to the bank. It will be readily seen that, while holding the land as security, the bank may have had the authority to sell and rent the lands, and collect rents therefor. Business connected with the renting and sale of the land, and the collection of rents, had no connection with the question involving the payment of the note. We conclude the evidence was rightly excluded.

V. The defendant alleged in his answer that the cashier of plaintiff informed him that the note had been paid, and that, relying and acting upon this information, he had omitted to secure his claim on his codefendant by reason of the execution of the note as surety. Wherefore defendant alleges that plaintiff is now estopped to claim that defendant is liable on the note. The court by an instruction withdrew the consideration of this defense from the jury, on the ground that it is not supported by proof. The ruling of the court is correct. The evidence wholly fails to show that defendant could have secured one cent from his codefendant, had he attempted to do so, after the statements as to the payment of the note alleged to have been made by plaintiff's cashier. In that condition of the proof, no verdict ought to have been found for defendant upon this defense, and, if the issue thereon had been submitted to the jury, and a verdict found for defendant upon that issue, it would have been set aside. We conclude, upon these considerations, that the district court rightly withdrew the defense from the jury.

5. TRIAL by jury: proof: practice.

This discussion disposes of all questions in the case, and leads us to the conclusion that the judgment of the district court ought to be AFFIRMED.

HENRY KUHLMAN, Appellant, v. N. E. WOOD, Appellee.

1. **Sale: FRAUD: RESCISSION.** The plaintiff agreed to sell to defendant certain specific articles of household furniture situated in a hotel for a sum named, but before delivery he removed a number of articles from the premises, and substituted for some other articles of less value. Upon discovery of these facts the defendant refused to carry out the agreement, and left the property in the possession of the plaintiff. *Held*, that the defendant was entitled to rescind the sale, and recover of the plaintiff the money paid thereunder.

2. **Chattel Mortgage: PAYMENT.** After the rescission of the above sale the defendant purchased a chattel mortgage against the same property, which, by the terms of the sale, he was to assume and pay. *Held*, that the contract of sale having been rescinded the purchase of the mortgage did not operate as a payment thereof, and that defendant was entitled to enforce the same against the property.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 15, 1890.

THIS is an action in equity, wherein the plaintiff seeks to have enjoined the foreclosure of a chattel mortgage on certain hotel property. The defendant seeks to recover of plaintiff the sum of one hundred and fifty dollars, on account of money paid by virtue of an agreement which was rescinded, as he alleges, in consequence of the fraudulent conduct of plaintiff. After a trial upon the merits, the district court dismissed the petition of plaintiff, and rendered judgment in favor of defendant for one hundred and fifty dollars, with interest, and costs. The plaintiff appeals.

Lutz & Sears, for appellant.

John N. Weaver, for appellee.

ROBINSON, J.—During the year 1888, the plaintiff was engaged in the business of keeping the hotel known as the "Madison House," in Sioux City. On the thirteenth day of April of that year he executed and delivered to one Rankin a chattel mortgage on the stock and furniture in said hotel, to secure the payment of a note for three hundred and fifty dollars, which was payable six months after that date. On the twenty-third day of August, 1888, the parties to this action entered into a verbal agreement for the sale by plaintiff to defendant of all the household goods used in carrying on the business of keeping said hotel, and the surrendering to the latter the possession of the hotel. The agreement required defendant to pay to plaintiff five hundred and eighty-seven dollars and fifty cents in cash; to give his note for three hundred dollars due in sixty days; and to assume the payment of the Rankin mortgage debt, on which there was then due three hundred and twelve dollars and fifty cents. The negotiations for the property were commenced on the twenty-first day of August, and substantially concluded on the next day. The hotel was visited by defendant on the first day named, and by himself and wife on the next day, the property inspected, and a memorandum of a part thereof taken. On the twenty-third day of August, defendant paid to the persons entitled thereto, to apply on the payments required by his agreement the sum of one hundred and fifty dollars, as rent for the hotel. Late in the afternoon of that day, he went to the hotel with his wife, servants and some provisions, for the purpose of taking possession. At that time he claims he discovered that much of the table furniture, and many of the napkins, towels, blankets, quilts and other articles, which he had purchased, were missing, and that in some cases articles of inferior value had been substituted for those he had purchased. He estimated that the property he found at that time was worth two hundred dollars less than that he had purchased, and refused to accept it unless the

1. SALE: fraud: rescission.

plaintiff would deduct that amount from the purchase price. But plaintiff refused to make the deduction demanded, and defendant refused to carry out the agreement, and left the hotel and all the property therein in the possession of plaintiff. Defendant afterwards purchased the Rankin mortgage, and was about to foreclose it when this action was commenced to restrain him. Plaintiff contends that he was able and willing to carry out on his part the agreement of sale; that all the property he had contracted to sell was in the hotel, and tendered to defendant when he went to it to take possession; and that, as it was a part of the agreement that defendant should pay the mortgage debt to Rankin, it should be regarded and treated as canceled by his purchase of it.

The real question which we are required to determine is whether there was such a difference between the property contemplated by the agreement and that tendered in fulfillment of it as authorized its rescission by defendant. The evidence is conflicting, but we think a fair preponderance establishes the following facts: Before the twenty-third day of August, the beds and bedding were inspected as they were found in the various rooms, and some of the towels, napkins, knives, forks, spoons and other table-ware were examined. The different articles were not counted, however, but the statement of plaintiff as to the number of each was taken and noted in a memorandum book by defendant. On the evening of August 23, much of the property inventoried by defendant could not be found. Instead of twenty-one pairs of blankets, as inventoried, but six pairs and one single one could be found. Twenty or thirty quilts were missing, and those found were of poorer quality and less value than those inventoried. Knives, forks, spoons, napkins, towels and other articles were missing, and plaintiff would give no account of them. The evidence satisfies us that the property tendered to defendant was not in some substantial respects that which he had agreed to purchase, and that the variance was so

2. CHATTEL mortgage: payment.

great that he was under no obligation to accept any of that tendered, but was authorized, after plaintiff's refusal to deliver the property agreed upon, to rescind the agreement, and is entitled to recover the money he had paid by virtue of it. When the agreement was rescinded his obligation to assume and pay the mortgage debt was at an end, and he had a right to purchase and enforce it against plaintiff in the same manner and to the same extent as though the agreement had never been made. Our conclusion is that the action of the district court was in all respects correct. It is, therefore, AFFIRMED.

THE STATE OF IOWA, Appellee, v. M. B. FOSTER, Appellant.

Larceny: IDENTITY OF PERSON: EVIDENCE. The defendant was brought from the state of Ohio to Appanoose county, Iowa, to answer an indictment for the theft of two horses, found against one Foster five years previous, and who had jumped his bail. In defense, he claimed that his name was Jared Hickey, and that, at the time of the commission of the offense alleged, he resided near Coldwater, Michigan. Twenty-two out of twenty-three witnesses, called by the state, testified that defendant was the identical man who had been found in the possession of the horses, and was arrested and lodged in jail five years before for the offense charged. Seven persons, among whom was the sheriff who made the former arrest, and the jailer then in charge of the jail, testified that defendant was not the man formerly arrested for the same offense. *Held*, that a verdict finding defendant guilty was sufficiently supported by the evidence.

Appeal from Appanoose District Court.—HON. H. C. TRAVERSE, Judge.

WEDNESDAY, OCTOBER 15, 1890.

THE defendant was tried, convicted, and sentenced to imprisonment in the penitentiary for two years and six months, upon an indictment for the larceny of two horses, and he appeals.

L. I. McCoun for appellant.

John Y. Stone, Attorney General, and *C. F. Howell*, County Attorney, for the State.

ROTHROCK, C. J.—I. On the sixteenth day of June, 1883, two horses, the property of one Silknitter, were stolen from his barn on his farm near Centerville, in Appanoose county. As soon as the theft of the horses was discovered, pursuit was made; and, in a day or two after the crime was committed, the thief was caught in Warren county, with the horses in his possession. He gave his name as that of William Foster. He was brought back to Centerville, by way of Chariton, and lodged in jail, to await the action of the grand jury. His bail was fixed at the sum of five hundred dollars. On the first day of September, 1883, before the indictment was found, one W. S. Scott appeared and deposited five hundred dollars in lieu of bail, and Foster was released from custody. An indictment was found shortly afterwards; and, when Foster was called to answer thereto, he failed to appear, and the deposit of five hundred dollars was forfeited. The *status* of the cause remained unchanged for about five years, when a man was arrested at Bowling Green, in the state of Ohio, upon a charge of horse-stealing. The sheriff of Appanoose county suspected that the man arrested in Ohio was the same person who stole Silknitter's horses; and, upon request, the authorities in Ohio sent a photograph of their prisoner to said sheriff, who proceeded to Ohio, procured a requisition from the governor of that state, and brought the defendant to Centerville to answer to the indictment. A plea of not guilty was interposed, and a trial was had, and the defendant was found guilty, and the verdict was set aside, and a new trial granted. The new trial resulted in a verdict of guilty, and from a judgment of conviction, as above stated, this appeal was taken.

It is conceded that the two horses were stolen, and that the man in whose possession they were found was

the person who committed the crime. The defendant claimed that he was not the person who was found in the possession of the stolen property, and that, at the time the crime was committed, and for all the time the thief was in jail, he (the defendant) openly and publicly resided near Coldwater, Michigan, and was not at any time during such imprisonment in this state; and that he is not William Foster, but that his name is and was Jared Hickey. It will thus be seen that the only real question for the jury to determine was whether the defendant was the same person who was found in possession of the horses. If he was the same person, the verdict is right; and, if he was not, an innocent man has been convicted of the crime.

The person who was arrested while in possession of the horses and brought from Warren county, by way of Chariton, to Centerville, taken before a justice of the peace, and committed to jail, was of course seen by many people. The state called and examined twenty-three witnesses upon the question of identity, and twenty-two of them testified positively that the defendant was the identical man who was arrested and brought to Centerville and placed in jail. Many of these witnesses appear to have been in possession of such knowledge of Foster as to leave little doubt that the defendant is the same man. One of them was the man at whose house Foster was stopping with the horses when the arrest was made. Another rode in a buggy with Foster from Chariton to Centerville. One or two of the witnesses were comrades of Foster while he was in jail. Others went to the jail while he was confined there for the purpose of seeing him. Now, while it is true that about five years elapsed from the time that Foster was released from jail until the defendant was brought from the state of Ohio to this state, yet the evidence of the identity of the person of the defendant when the state rested its case was more than sufficient to convict the defendant. It was absolutely overwhelming.

The defendant called and examined seven witnesses, three of whom were residents of Appanoose county.

Three were residents of the state of Michigan, and the defendant was also examined in his own behalf. Two of the witnesses from Michigan claimed to be the mother and sister of the defendant. The resident witnesses were the ex-sheriff who arrested the man who called himself Foster, and the jailer who was in charge of the jail while Foster was confined therein. They both testified positively that the defendant was not Foster. It appears from their testimony that, after the defendant was brought from Ohio, a man came to Centerville clandestinely, and was also at Lineville, Missouri, and that his presence was made known to them, and he claimed that he was the man who committed the crime. They gave facts and circumstances which the clandestine visitor related to them as having occurred while he was in jail, which convinced them that he was the man who was in jail as the thief. Of course, the women claiming to be the mother and sister of the defendant were equally positive, and the testimony of the defendant was to the same effect.

Notwithstanding the testimony of these witnesses, the jury found the defendant guilty. In our opinion, they were fully warranted in so finding. We cannot give the evidence in detail. It is sufficient to say that there are many circumstances which lead to the conclusion that the man who appeared at Centerville and Lineville, and claimed to be Foster, was not the man he represented himself to be. The state in some way procured a picture, known as a "tintype," of this person. It is true it is not admitted by the defendant that the picture is that of the man who claimed to be Foster, but the evidence shows that fact without much question; and it appears, without any real question, that the tintype is not a picture of the Foster who stole the horses in 1883. We are content to abide by the verdict of the jury, without any serious question in our minds as to its correctness.

II. There is little more in the case which we think demands attention at our hands. The instructions given by the court to the jury are fair to the defendant.

There is no just ground of complaint as to any of them; and we may say the same of the objections to the rulings on the admission and exclusion of evidence, and other rulings of the court. To state them would be sufficient to show that they were correct, and we must be permitted to dispose of them in this general way. The judgment of the district court will be AFFIRMED.

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JOSEPH MATT, Appellant, v. IOWA MUTUAL AID ASSOCIATION, OF OTTUMWA, IOWA, Appellee.

1. **Insurance: BENEFIT CERTIFICATE: LIMITATION OF ACTION.** Under a clause in a certificate of insurance in a mutual benefit association limiting the time for action thereon to six months, after the death of the assured, the limitation will not commence to run until the cause of action on such certificate matures.
2. ——: ——: **VENUE.** A condition in a contract limiting the venue or place where action may be brought thereon is invalid.

Appeal from Clayton District Court.—HON. L. E. FELLOWS, Judge.

WEDNESDAY, OCTOBER 15, 1890.

THIS is an action in equity upon a certificate of life insurance issued to Andreas Matt, payable upon his death to plaintiff, asking a decree that defendant be required to make an assessment based on the death of said Andreas Matt, and pay the proceeds to plaintiff. The defendant demurred to the petition upon the following grounds: That the petition shows that plaintiff's right to sue was barred or cut off by the limitation clause of the policy; and that under the terms of the policy suit can only be brought in Wapello county. The demurrer being sustained, and plaintiff electing to stand upon the petition, judgment was entered dismissing the same, from which plaintiff appeals.

Murdock & Murphy and *John Larkin*, for appellant.

R. E. Price and *McNett & Tisdale*, for appellee.

GIVEN, J.—I. The clause in the policy out of which these questions arise is as follows: "*Second.* No action of any kind shall be maintained upon this certificate, or against the association, for any cause connected therewith, except in the county of Wapello, where its principal office is situated; nor unless satisfactory proofs are furnished the association within sixty days; nor unless such action is commenced within six months after the happening of the death on account of which the action is brought,—any statute of limitation or law to the contrary notwithstanding." The appellee contends that under this clause plaintiff's right to sue was barred after six months from the happening of the death. The appellant contends that her right to sue was not barred until six months after the time at which suit could be brought. If appellee's position is correct, then this action was barred, and the demurrer was properly sustained; otherwise not. This precise question was before this court in *McConnell v. Iowa Mut. Aid Ass'n*, 79 Iowa, 757, upon a certificate of insurance similar, if not identical, with this, wherein it was held that the limitation did not commence to run until the cause of action matured. This opinion was carefully reconsidered on a petition for rehearing, and adhered to.

1. INSURANCE: benefit certificate: limitation of action.

II. The other question discussed is fully, and, to our mind, well answered in May on Insurance, section 490, and authorities there cited. The author there says: "A provision in the charter defining the court in which suit may be brought on certain conditions is valid, if the conditions are strictly complied with. If not, suit may be brought in any court having jurisdiction. A condition in the contract limiting the venue or place where the action shall be

2. —: —: venue.

brought is invalid. There is an obvious distinction between a stipulation by contract, as to the time when a right of action shall accrue or be lost, on the one hand, and a stipulation as to the forum before which, and the proceedings by which, an action shall be commenced and prosecuted on the other. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract, and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated by law. The time within which money shall be paid is matter of contract, depending on the will and acts of the parties; but, in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. It is, moreover, a well-settled maxim that parties cannot, by their consent, give jurisdiction to courts, and it would seem to follow that parties cannot take away jurisdiction where the law has given it; and mutual and stock companies are equally under the disability." In *Insurance Co. v. Stukey*, 18 Ohio, 455, referred to by appellee, the company was chartered by a special act that fixed the place at which suits must be brought. That decision is based upon the charter, and not upon contract. *Dutton v. Vermont Mut. Fire Ins. Co.*, 17 Vt. 369, is not in point. The question in that case was as to limitation of time and not of place. The provisions of our Code are clearly decisive of this question. The petition shows that the defendant is an insurance company; that this contract of insurance was made in Clayton county; and that the assured died in that county. Section 2584 of the Code provides that insurance companies may be sued in any county in which the contract is made, or in which the loss occurs, thereby making the county where such contracts are made, or where such losses occur, the place where the contract is to be performed. The clause of

this certificate limiting the place of bringing actions to Wapello county is contrary to the spirit, if not the letter, of our statutes, and not sanctioned by the law.

Other points stated in the demurrer were not argued, and, therefore, not noticed. Our conclusion is that the demurrer should be overruled. The judgment of the district court is, therefore, REVERSED.

THE STATE OF IOWA, Appellee, v. JOSEPH ROW, Appellant.

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1. **Indictment for Murder:** CONVICTION FOR MANSLAUGHTER: CONSPIRACY: EVIDENCE: ERROR WITHOUT PREJUDICE. Where a trial upon an indictment for murder results in a verdict against defendant for manslaughter only, evidence introduced by the state in proof of a conspiracy to commit murder, and of declarations and admissions made by the co-conspirators, and the instructions of the court to the jury in relation thereto, if erroneous at all, will be deemed error without prejudice, as, in acquitting the defendant of the charge of murder, the jury must have found in his favor on the question of the alleged conspiracy.

2. ———: PUBLIC OFFICER: PROOF OF CAPACITY. Testimony that one has acted in the capacity of a stated public official is competent evidence that he occupies such official position.

3. ———: WITNESS: IMPEACHMENT. A party, against whom a witness is used, is entitled to question him on cross-examination as to his past and present associations, business and residence, even though the examination elicit the fact that he has been an inmate of the county jail.

4. ———: EVIDENCE: RECORD. An assignment of error based upon the refusal of the trial court to receive the testimony of a witness in answer to a particular question will not be considered by the supreme court where the subject-matter of such testimony is not indicated in the question asked, nor by any statement in the record, and the answer might have been incompetent, irrelevant and immaterial.

5. ———: ———: PROCEEDINGS OF CORONER'S JURY. Minutes of the proceedings and verdict of a coroner's jury upon an inquest over the body of one murdered are not admissible in evidence upon the trial of one under indictment for such murder.

6. ——— : ———. The exclusion of the testimony of a witness, upon a trial for a criminal offense, that he was subpœnaed by the state and had been discharged by its counsel without being called to testify, is not erroneous.

7. ——— : ———. A witness for the defendant, having testified to having sold two revolvers to the accused, was asked various questions on cross-examination, as to whom the same were charged on his books, and whether they were not charged to defendant's employers. *Held*, that the inquiry was material.

8. ——— : ——— : MINUTES OF GRAND JURY. Two members of the grand jury, which had found the indictment under which defendant was on trial, were called by the state, on rebuttal, for the purpose of proving what was the testimony of one of defendant's witnesses before such jury, and of thereby contradicting his testimony given upon the trial. In framing his questions to such witnesses counsel for the state used the minutes of the testimony taken before the grand jury. *Held*, without determining whether such use of said minutes might not be in a manner to make it prejudicial, that the record in this case showed no just ground for complaint on that account.

9. ——— : INSTRUCTIONS : LESSER OFFENSE. An instruction to a jury that under an indictment for the crime of murder, if the evidence was sufficient, the defendant could be convicted of murder of the first or second degree, or of manslaughter, without an instruction that there might be a conviction for an assault with intent to commit a crime, or for a simple assault, is not erroneous in a case where the fact of homicide is undisputed, and the defendant, if guilty of any crime under the evidence, is guilty of murder or manslaughter.

10. ——— : ——— : JUSTIFIABLE SELF-DEFENSE. An instruction to a jury that, if they found the defendant shot and killed the deceased in justifiable self-defense, they should acquit him, coupled with an instruction as to what would justify or excuse the taking of human life, is not objectionable because of the use of the qualifying word "justifiable" in connection with the term self-defense.

11. ——— : ——— : RESISTING OFFICER : FORCE USED IN SELF-DEFENSE. An instruction that one "may rightfully resist, by reasonable and moderate force, an unlawful and unauthorized attempt to arrest him, * * * but is not justified in carrying such resistance to an immoderate extent or in using such extreme force or violence as to imperil life, unless * * * he fairly and honestly believes that he is in imminent peril of death or of great bodily harm, and there is no other reasonable way of escaping the danger except by killing his assailant," is not subject to the objection, that it justifies in self-defense, under such circumstances, the use only of "reasonable and moderate force."

12. ——— : TRIAL : PRESENCE OF JURY. Upon a trial under an indictment for the commission of a felony, the court may, after the evidence is closed, direct the jury to retire to another room while it hears arguments from counsel upon the legal propositions involved in the case, and to be presented in the court's charge to the jury.

13. ——— : LIMITATION OF ARGUMENTS TO JURY. At the close of the opening argument of one of the attorneys for the state, defendant's counsel asked to have the cause submitted to the jury without further argument. The state, thereupon, obtained permission to further address the jury, and afterwards arguments were made by defendant's counsel. *Held*, that the matter was one resting in the discretion of the court, and it was no abuse of such discretion, under the circumstances, to refuse to submit the case without affording the state an opportunity for further argument.

Appeal from Boone District Court.—HON. S. M. WEAVER, Judge.

WEDNESDAY, OCTOBER 15, 1890.

INDICTMENT for murder in the first degree. On the seventh day of March, 1887, the defendant was in the employ of Hurlbut, Hess & Co. and C. H. Ward. C. H. Ward owned two transfer teams, and defendant and one Campbell, employed by defendant, drove the teams for the delivery and transfer of goods of Hurlbut, Hess & Co. and C. H. Ward, in Des Moines, and on the evening of March 7, 1887, both defendant and Campbell were engaged with the teams in the delivery of goods, and on the wagon driven by Campbell were intoxicating liquors. S C. Logan was at that time a constable, residing in Valley township, in Polk county, and was active in the enforcement of the law against the sale of intoxicating liquors in the city of Des Moines, and had in his employ and with him on the seventh of March, 1887, one E. G. Hancher. Logan, Hancher, and others thus engaged, were by some designated as "searchers," because searching after liquors unlawfully kept for sale. About six o'clock on the evening of March 7, they found Campbell on the street in Des Moines delivering goods, including intoxicating liquors, and Logan, without a warrant, arrested him. The team

was left with Hancher, and Logan and Campbell went together to the place of business of Hurlbut, Hess & Co. to inquire if a permit was held for Campbell to make such deliveries. While they were in the building, the defendant came in, and, after inquiring if Logan had a warrant for the arrest of Campbell, and being told that he had none, he said, in substance, that Logan had no right to make the arrest without a warrant, and told Campbell to "go and deliver the goods," and gave Campbell a slight push. Some words passed between Logan and defendant with reference to defendant's interference, and Logan drew his revolver. The defendant also drew his revolver, and shot Logan twice, the first wound being mortal, and the second probably so. The cause was transferred to the district court of Boone county, and the trial resulted in a verdict of manslaughter, and a judgment of five years' imprisonment in the penitentiary, from which the defendant appeals.

Cole, McVey & Clark, for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the State.

GRANGER, J.—I. A theory of the state on the trial in the district court was that there was a conspiracy among certain members of the corporation of Hurlbut, Hess & Co. and its employes to resist the efforts of officers or persons engaged in the enforcement of the law against the sale of liquor, in so far as such efforts led to the seizure of liquors in the building, or its delivery therefrom to patrons, and that the shooting of Logan by the defendant was a result of such conspiracy. The theory of the prosecution has led to the assignment and argument of very many errors resulting from the introduction of evidence and the instructions of the court. If such a conspiracy was formed, and the killing was the result, it cannot be questioned that the acts and declarations of the members

1. INDICTMENT for murder: conviction for manslaughter: conspiracy: evidence: error without prejudice.

of the conspiracy in furtherance of their designs, although made in the absence of the defendant, would be admissible in evidence. 1 Greenl. Ev., sec. 111; *State v. Nash*, 7 Iowa, 347. See, also, *State v. McGee*, *ante*, p. 17, and cases there cited. The rule admitting such testimony invests the trial court with a large discretion. It should be satisfied *prima facie* of the existence of the conspiracy, and because of the particular stage of the inquiry when the rulings are to be made; or, the *prima facie* showing determined, the question is particularly one for that court. *Card v. State*, 9 N. E. Rep. (Ind.) 591; *State v. McGee*, *supra*.

Guided by the rule stated, we have no hesitancy in saying that the district court, in admitting the evidence, on the basis of the existence of a conspiracy, did not abuse its discretion. The record is a justification of the court's action in that respect. Besides the particular complaints as to questions and answers, there is in argument a general complaint that, because of the course pursued by the court in admitting so much of evidence without any foundation or right, the minds of the jury were affected to the prejudice of the defendant generally; and it is only because of this complaint that we notice the question of a conspiracy to the extent of determining that there was such a *prima facie* showing as to justify proofs of the acts and admissions of co-conspirators. The indictment was for murder of the first degree, and on the trial it was competent to admit evidence tending to establish murder of either degree, or of manslaughter. The question of a conspiracy had reference only to the crime of murder. Its bearings were alone with reference to the essentials of that crime,—premeditation and malice. To justify a verdict of manslaughter, the jury was told that the killing must have been "done as the result of some sudden, violent impulse of passion or excitement, or in the heat of a sudden quarrel, and upon reasonable provocation, without time between the provocation given and the killing for the blood to cool, or the voice of reason and judgment to be heard, and without opportunity to premeditate or reflect upon the

crime and its consequences." The verdict of the jury was for manslaughter, and hence its findings must have been that the killing was not the result of a conspiracy. If so, errors in respect to evidence on that question are without prejudice. This holding divests the record of many of its complaints, numbering one hundred and seventy-five assignments, supported by an argument of forty-seven distinct divisions, in which every assignment is urged for our consideration.

II. One Bruce E. Jones was a witness for the state, and was asked what official position Logan held in Polk county, and, against objections, was allowed to answer that he acted as constable in Valley township, Polk county. It is urged that the record is the best evidence of the fact, and for that reason the testimony was incompetent. Mr. Greenleaf says, that all who are proved to have acted as public officers are presumed to have been duly appointed to the office until the contrary appears; and it is not material how the question arises, whether in a civil or a criminal case, or whether the officer is or is not a party to the record. 1 Greenl. Ev., sec. 92. See, also, *Londegan v. Hammer*, 30 Iowa, 508; 1 Phil. Ev. 642; Starkie, Ev., sec. 646. There was no error in the ruling of the court.

2. ——: public officer: proof of capacity.

III. Jerry Grider was a witness for the state, and the defendant used one Henry Clay to impeach him by proving his general reputation for truth and veracity, and his general moral character. On cross-examination, the witness was asked what his business was, and where he resided. He said his business was whitewashing, kalsomining and frescoing, and that he resided on Third street in Des Moines, and was boarding. To the question, "Whereabouts?" he answered: "Two weeks ago I was boarding on Third street. The week before I was up with Mr. Wise." "Whereabouts did Mr. Wise live?" *A.* "Well, in Polk county. Well, you want to know it; I was in the Polk county jail at that time." These answers were given under objections to the questions, and the point

3. ——: witness: impeachment.

urged in support of the objections is that it was an effort to impeach a witness "by showing special facts in his history," when only his general character could be assailed, and we are referred to *State v. Gordon*, 3 Iowa, 410. In that case the defendant used a witness to prove his good character, and on cross-examination the state inquired into particular acts of the defendant, against objections, which this court held to be error. The question in this case is very different. It is the right of a party against whom a witness is used to know certain facts as to his history that will aid the jury to properly estimate the value of his statements; and, guided by the discretion of the trial court, inquiries may be made into such matters as will show a disposition or likelihood to favor the party for whom he is called, and to disclose his opportunities for knowing the facts as to which he has given evidence. Such inquiries may involve the associations, business and residence of the witness, and the right of such inquiries is seldom, if ever, denied.

IV. William Hall was a witness for the defendant, and testified that for nine years he had been engaged with the police force of the city. He was then asked as follows: "State what you heard, if anything, S. C. Logan say in respect to what he would do at the house of Hurlbut, Hess & Co., if he had occasion to go there." An objection that it was incompetent, irrelevant and immaterial was sustained, and complaint is made of the ruling. It is true there might have been an answer not open to the objections, and it is equally true that there might not. The question does not call the attention of the witness to the subject-matter of the statements by Logan, so as to enable us to know whether or not it was material. It is said in argument that the court would not allow such a statement, but the record does not show it, and it is the record that must guide us. An unobjectionable question or two would have so shaped the record as to have been a guide to us to know the relevancy of the testimony desired. Error does not affirmatively appear.

4. —: evidence: record.

V. The defendant offered in evidence the proceedings before the coroner, including the verdict of the jury, which, on objection, was excluded. This action of the court is unquestionably right. The reference to 1 Greenleaf on Evidence, section 556, does not support appellant's claim. The "inquisitions" spoken of in the section are not of such a character. The only possible object of the record would be to show that the jury at that investigation found that the defendant in shooting Logan acted in self-defense. The section would make the record equally applicable on the part of the state if the jury had found that defendant unlawfully took the life of Logan. We think there is no precedent for appellant's claim in judicial trials.

5. ——: ——: proceedings of coroner's jury.

VI. C. L. Smith was called as a witness by the defendant, and testified that he was subpœnaed by the state, and had been discharged by its counsel. On motion by counsel for the state this testimony was stricken out. We are unable to see how there could have been prejudice because of this action. If for any reason, after the witness arrived, the state concluded that it would not use him, why should that fact be made known on the trial? It is said in argument that it "was error beyond question," but we are not told what bearing the evidence could have on the merits of the case, or how the exclusion could affect the defendant prejudicially.

6. —: —.

VII. The same witness for the defendant testified that defendant, about February 18, 1887, bought of him two revolvers; that he wanted them on credit, and said he would get "Hurlbut and Hess" to vouch for him; and that one of them did appear, and said it would be all right, if defendant wanted anything, to let him have it, and he let him have the revolvers. On cross-examination the witness testified that the price charged on the books was the retail price, two dollars and twenty-five cents. He was then asked to whom the charge was made, and he said,

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to "H. Haas & Co., or to H. Haas." The objection to the question was that it was immaterial. The inquiry was as to the same transaction detailed on direct examination, and bore directly on the question of the sale, and we think it was material. Several other questions were asked on cross-examination as to the charges on the books for the revolvers, designed to show whether the charge was intended for H. Haas & Co., or Hurlbut, Hess & Co., and objections were made on several grounds, and, among them, that the books were the best evidence of their contents. No such objection was made to the question calling for what the charge in the books was, and the fact as to that was stated without objection as to its competency. The remaining questions as to which incompetency is urged are as to the knowledge of the witness of the parties, and his purposes in making the charge, and the objection in that respect is without force; and, under the issues involving a claimed conspiracy with Hurlbut, Hess & Co. or the members of the corporation, the inquiry was material.

VIII. Nye and Crabtree were both members of the grand jury that returned the indictment, and, on rebuttal, were called by the state to prove what the testimony of J. R. Hurlbut was before the grand jury, with a view to contradict his statements on the trial; and it is urged that, in the examination of these witnesses, the counsel for the state held in his hands the minutes of the testimony taken before the grand jury, and read therefrom, and stated in the presence of the jury what the paper was. The record does not sustain the claim. It is true that counsel read to the witness, but it does not appear what he read from, or that the jury knew what the paper was; nor do we find that objection was made to the reading from the paper at the time. There are objections to the questions, but not to the manner of presenting them. If we assume that the questioner, in framing questions, said to the witness, "Did you not before the grand jury testify as follows?" and then read

8. ——: ——: minutes of grand jury.

from the minutes the remainder of the question, the point would not be controlled by the case of *State v. Hayden*, 45 Iowa, 11; for in that case the holding is that the minutes taken before the grand jury are not admissible in evidence to contradict a witness who testified before the grand jury, and also on the trial of the indictment. In this case, at most, the minutes were only used to aid counsel to form the questions; and, without saying that such use might or might not be in a manner to make it prejudicial, it is quite clear that the record affords no just grounds of complaint. Similar complaint is made of a like use of the minutes on a cross-examination of certain witnesses, who were also witnesses before the grand jury, but the point does not require further consideration.

IX. The district court instructed the jury that under the indictment, if the evidence was sufficient, the defendant could be convicted of murder of the first or second degree, or of manslaughter; and complaint is made of a neglect to instruct that, under the indictment, there might be a conviction of an assault with intent to commit a crime, or of an assault. The facts of the case would not justify such an instruction. Under the evidence, the defendant, if guilty of any crime, was guilty of murder or manslaughter. It does not follow that because an assault is included in the crime of murder, as held in *State v. Parker*, 66 Iowa, 586, that on the trial of every indictment for murder, if the defendant is guilty, the jury may properly return a verdict for an offense less than those resulting from criminal homicide. In this case the homicide is undisputed. The defendant shot and killed Logan. The homicide is either excusable or criminal. If excusable, the act is untainted with crime of any character; if criminal, the crime is either murder or manslaughter. Where an assault results in the taking of life, the offense, if any, must of necessity be greater than that of an intent to take life. In the case of *State v. Parker*, *supra*, the evidence was such that the jury could have found that there was an assault

9. ——: instructions: lesser offense.

with intent to take life, but that death resulted from other causes. This point is expressly ruled in *State v. Froelick*, 70 Iowa, 213; *State v. Mahan*, 68 Iowa, 304.

X. The court gave the following instruction: "18. Defendant, on the trial, admits that he shot and killed the said S. C. Logan, but insists that he so shot and killed him in justifiable self-defense; and if from all the evidence you find that he did so act, or if from all the evidence you have reasonable doubt whether he acted wilfully, and without such excuse or justification, then you should acquit. If, however, on a fair and full consideration of the entire case, you do not so find, and do not entertain any such reasonable doubt, then defendant is guilty of murder in the first degree, murder in the second degree, or manslaughter, as you shall find the facts warrant, and such should be your verdict. What will constitute justifiable killing in self-defense will be explained to you in a subsequent paragraph of this charge."

10. —— : —— : justifiable self-defense.

Appellant says: "The error is in qualifying or intensifying the idea or phrase 'self-defense' by the word 'justifiable.'" And it is said in argument that the word "justifiable" implies a higher degree of right conduct than the word "excusable," and the instruction is criticised because of the use of the word "justifiable," to the exclusion of such expressions as "excusable self-defense," or "excusable killing in self-defense," if either modifier is to be used; but it is urged that the term "self-defense" is well defined in the law, and that such terms as "justifiable self-defense" or "excusable self-defense" are not used by law-writers, and that, by the use of the former, the jury must have presumed that "justifiable" self-defense was something more and higher and better and purer than "self-defense." The thought, to us, is rather of hypercritical than of practical significance. Conceding that, in the eye of the law, an act in self-defense is one that the law will justify or excuse, and that such justification or excuse is an attribute of self-defense, and understood when not expressed, still we must keep clearly in view

the work in hand, and repress any disposition to technical construction that might defeat the object of the inquiry. Self-defense, in its ordinary, is quite different from its legal, acceptation; as, if a person should slay his assailant because assailed by him, and, to avoid the assault, he would, in the ordinary acceptation of the term, act in self-defense, although he might not have observed the requirements, which, under the law, would justify or excuse his conduct. Self-defense in such a case would not be excusable or justifiable, while with the law observed it would be. Hence, stripped of legal refinements, there is a propriety in the use of such terms. The charge of the court was to aid the jury to understand the legal questions involved, and that of self-defense was a prominent one in the case. It was certainly proper that the jury should not be left to its own idea of self-defense; and the court, in another division of its charge, told the jury what conditions would justify or excuse the taking of human life, and speaks of such an act as "done in justifiable self-defense." Omit the word "justifiable," and the criticism would be avoided. Its use in the light of the explanation by the court gives to the term "self-defense" no added importance, and the design evidently was to keep alive in the minds of the jury the distinctive character of the defense to be considered. There is no force in the claim of prejudice from the use of the word "justifiable" instead of "excusable." The words are synonyms, but, perhaps, not always of like meaning. There is, however, no practical distinction in the use of the words in this connection. What would excuse the killing would amount to a justification, and the reverse would be equally true.

XI. The court also gave the following instruction: "28. If a man knowingly resists an officer in the discharge of his duty, and, in making such resistance, kills him, malice will be implied from such killing, and he will be held guilty of murder in the first degree or second degree, according as it shall be shown that the act was done with or

11. —: —: resisting officer: force used in self-defense.

without deliberation and premeditation. One may, however, rightfully resist, by reasonable and moderate force, an unlawful and unauthorized attempt to arrest him, or restrain him of his liberty; but is not justified or excused in carrying such resistance to an immoderate extent, or in using such extreme force or violence as to imperil life, unless the circumstance and manner of the attempted arrest be such that, as an ordinarily reasonable and prudent man, he fairly and honestly believes that he was in imminent peril of death or of great bodily harm, and there was no other reasonable way of escaping the danger except by killing his assailant."

It is said the instruction only justifies in self-defense the use of "reasonable and moderate force," and it is urged that the only limit which the law places upon a man thus wrongfully sought to be deprived of his liberty is just that force which will prevent the doing of the unlawful purpose. That is the clear import of the instruction given. It enjoins moderate force only where moderate force will be effective, and it justifies sufficient force, even to the extent of taking life. The difficulty lies in giving effect to only a part of the language used.

XII. After the testimony closed, the court desired that counsel should first argue the legal propositions involved; and at the instance of the counsel for the state, and against the objections of the defendant, the court directed the jury to retire to another room during such argument, which it did. This action of the court is said to be error. The argument in support of the assignment is, in brief, that the jury is an important element of the courts, and that no steps in the progress of the trial can properly take place "without the presence of all the elements necessary to constitute a complete court." In support of the rule we are referred to *State v. Carman*, 63 Iowa, 130, and *State v. Larrigan*, 66 Iowa, 426. In each of those cases it is held that, on the trial of an indictment for a felony, the defendant cannot waive the presence of a jury, and that, without the aid of a jury, a judgment of conviction is void. The

12. ——: trial: presence of jury.

effect of such a ruling upon the question before us is not intimated in the argument, and we are unable to discern it. After the taking of testimony in a case is closed, and the court desires to reach a conclusion in its mind as to the rules of law to be announced in its instructions, if the jury has any part or concern in its means or methods of obtaining the information, or reaching its conclusions, we are not advised what it is. If the court should announce a recess, and the judge should repair to a library to consult authorities, or to counsel with disinterested persons to inform himself, it would hardly be urged that the proceeding was erroneous. It is certainly then not the law that the defendant has a right to the jury's presence when the court obtains information as to the law of the case, and the essence of appellant's claim is brought to this: If the court obtains such information at a particular time and place, he has that right; otherwise not. It is not contended that the presence of the jury could properly have changed the result, nor could such a contention in reason be. The presence of the jury during such argument, then, is for no purpose, and the right, if it exists (which we do not decide), is purely a technical one, and under Code, section 4538, we are to disregard "technical errors or defects which do not affect the substantial rights of the parties." This point did not receive attention in the argument by appellee, and we think it inadvisable to consider it upon other grounds.

XIII. Three different attorneys for each side argued the cause to the jury. The opening argument for the state was by Mr. Whitaker, county attorney for Boone county, followed by Judge Cole, for the defense, and he by Col. Hepburn, for the state, and he by Gov. Stone and John A. Hull, for the defense, and closed for the state by W. W. Phillips, county attorney for Polk county. At the close of the opening argument by Mr. Whitaker, counsel for the defendant asked to have the cause submitted without further argument, waiving argument for the defense. Mr. Phillips then asked that Col. Hepburn

18. ——: limitation of arguments to jury.

be allowed to further address the jury on behalf of the state, which was granted against objection, and the argument then proceeded in the order above indicated. We are justified in assuming that the district court believed that the opening argument was not such as the state was entitled to, if the cause was to be submitted thereon. With the number of arguments to be made, and the order in which they were to be made, it is easy to see that the state might have been placed at a great disadvantage by a partial presentation of the case, relying on the next counsel for the state to present other points, and he to be followed by other counsel for the defense; and we may assume that some such considerations controlled the action of the court. There is nothing to indicate an abuse of the discretion with which the district court is invested in such matters.

XIV. Complaint is made that Mr. Phillips, in the closing argument to the jury, abused his privilege by a statement of facts foreign to the case, and prejudicial to the defendant. The abstract contains several pages of the argument, which cannot be set out, and an extended discussion of the point would be of no avail. The argument did not introduce into the case facts as to which there was no evidence, as was the case in *Hall v. Wolff*, 61 Iowa, 559, nor do we discover anything in the argument unusual, or that could prejudice the defendant.

XV. As we have said, the verdict is for manslaughter, which operates to acquit the defendant of the crime of murder. We could not, with propriety, attempt, in an opinion, a discussion of the multitude of questions presented by the assignments and arguments. We have, therefore, confined ourselves mainly to such questions as bear most directly on the validity of the verdict returned; but, in so doing, we have not overlooked other questions which might have been to the prejudice of the defendant, to avoid which the entire record has been carefully considered. The instructions are voluminous, covering every phase of the case, and, we think, fair to the defendant. Those asked, in so

far as they correctly express the law, are not more so. The careful and unprejudiced reader of the record cannot well avoid the conviction that the defendant was something of a champion of a purpose to resist the enforcement of the law; and, with weapons procured and to be used for that purpose, if necessary, he placed himself where duty did not call, and interfered where interference was forbidden by the law. The verdict of the jury frees him from the odium of having taken a human life as the result of premeditation or malice, and convicts him of having taken life under such provocation that the degree of his offense is manslaughter, and not murder. The verdict has abundant support in the evidence, and we think the judgment of the district court should be, and it is, AFFIRMED.

WARDER-BUSHNELL & GLESSNER COMPANY, Appellant, v. J. D. HARRIS *et al.*, Appellees.

Conversion: AGENCY. One charged with the unlawful seizure and conversion of personal property cannot escape liability therefor upon the ground that the seizure and conversion were made by him simply as the agent of another.

Appeal from Osceola District Court.—HON. C. H. LEWIS, Judge.

THURSDAY, OCTOBER 16, 1890.

ACTION at law for certain wheat, other grain and flax, owned by plaintiff, which was taken by defendants, and converted to their use. The cause, as to defendant Harris, was tried to the court without a jury, and judgment was rendered for defendant. The plaintiff appeals.

D. D. McCallum, for appellant.

O. J. Clarke, for appellee.

BECK, J.—I. The abstract shows that defendant Harris answered the petition, and the trial was as to him alone. His answer admits the taking of the property, and alleges that he was acting in the matter as the agent, and under the direction of his codefendant Close, who was the owner thereof under a mortgage. All other allegations of the petition are denied. It is admitted by the parties that plaintiff held the property under a mortgage which was prior and paramount to the mortgage under which the defendants claim it. It is admitted that Harris had constructive, though not actual, notice of plaintiff's mortgage.

II. We are authorized to conclude that the district court found for defendant on the ground that he took the property while acting as agent of Close. The admitted facts are that defendant took the property; and the conclusion of law is that, as between plaintiff and defendant, the plaintiff had the right to the possession of the property under the mortgage, the ownership thereof being vested in plaintiff, the mortgagee. Code, sec. 1927; *Gordon v. Hardin*, 33 Iowa, 550; *Doane v. Garretson*, 24 Iowa, 351. The defendant Harris took and converted this property. He is liable for damages. The fact that he was agent of his codefendant does not discharge him from this liability. The act was not done under a contract. It was done in violation of plaintiff's rights, and without the sanction of law. It was, therefore, a tort, for which he is presumably liable. Story on Agency, sec. 308. The capacity in which a tortfeasor acts, whether as agent, trustee, servant or public officer, does not protect him from liability for his torts. The court below erred in rendering judgment for defendant. REVERSED.

MASSACHUSETTS LOAN & TRUST CO., Appellee, v. H. C. MOULTON *et al.*, Appellants.

Chattel Mortgage: NOTES: PRIORITY OF LIEN. **A chattel mortgage was given to secure the payment of three promissory notes falling due at different times. After the payment of the note first maturing, the note last maturing was transferred, before maturity, to the defendants. Thereafter there was an exchange of part of the mortgaged property between the mortgagor and mortgagee, whereby the second note was in part, if not wholly, paid. Subsequently, this second note was transferred, after maturity, to the plaintiff. *Held*, that the note last maturing should be first satisfied out of the property remaining subject to the mortgage.**

Appeal from Osceola District Court.—HON. C. H. LEWIS, Judge.

THURSDAY, OCTOBER 16, 1890.

THIS is an action of replevin for the possession of a threshing machine, known as a Minnesota chief separator. A jury was waived, and the cause was tried to the court. There was a judgment entered for the plaintiff. The defendants appeal.

D. D. McCallum and *C. M. Brooks*, for appellants.

O. J. Clarke, for appellee.

ROTHROCK, C. J.—It appears from the record and the evidence in the case that on the thirtieth day of August, 1886, J. E. Miller and J. C. Lynn executed a chattel mortgage to E. D. Brown as receiver of the Northwestern Manufacturing & Car Company upon one Minnesota chief separator, and one Pitts horsepower, to secure the payment of three promissory notes of even date with the mortgage, and payable as follows: One note for one hundred and fifty dollars payable November 1, 1886; one note for one hundred and forty dollars payable November 1, 1887, and one for one hundred and

forty dollars payable November 1, 1888. The first note has been paid, and the second note, which became due November 1, 1887, was, at the commencement of this suit, owned by the plaintiff. The third and last note was owned by the defendants, it having been assigned and transferred to them about October 30, 1886.

After the mortgage was executed and delivered, another transaction took place between the mortgagors and the mortgagee, by which the horsepower included in the mortgage was taken in exchange, and as part payment, for a steam-engine purchased by the mortgagors from the mortgagee. The horsepower was taken in part payment of the sum of two hundred dollars. In that part of the mortgage providing for a foreclosure and application of the proceeds of a foreclosure sale, there is this provision: "Out of the proceeds of said sale to pay as far as possible, *first*, the expenses of taking, keeping, advertising and selling said property, and the statutory attorney's fees in such case made and provided; *second*, to apply the balance toward paying that part of said debt evidenced by the notes then owned by second party; *third*, to apply the balance towards the payment of that part of said debt, evidenced by the notes not then owned by said second party, and then rendering the overplus, if any, to said first party or * * * heirs or assigns." The exchange of the horsepower as part payment for the steam-engine was made in June, 1887. The plaintiff acquired its right to the mortgage and the second note on the second day of February, 1888.

It will be observed that the proceeds of the sale of the property after paying costs is to be applied to the payment of any note owned by the car company. It is conceded that the car company does not now own any of the notes. The plaintiff owns one, and the defendants own the other. The plaintiff insists that it should have the first lien upon the property, because its note became due before the note owned by defendant, upon the familiar principle that the proceeds of the sale of mortgaged property should be first applied to the payment of the

debt which first becomes due. We do not understand that defendants' counsel dispute this rule. But it is claimed that the transaction by which the horsepower was taken in part payment for the steam-engine operated as a payment, or rather an extinguishment, of the note now held by the plaintiff, as between the defendant and the plaintiff. It is to be observed that the defendants became the owners of the last note long before the same became due, and before the horsepower was exchanged for the steam-engine. They then had a lien upon all of the property. The plaintiff took an assignment of the second note and mortgage long after the note became due, and after the horsepower had been disposed of. The plaintiff will be presumed to have known that the lien they took was not a lien upon the horsepower. The mortgagee had no power to impair the security of the defendants by depriving them of their lien on the horsepower. If the mortgagee had held the second note, and was now seeking a foreclosure and the application of the proceeds of sale first to that note, the defendants could well insist that they should first account for the value of the horsepower. And we are unable to discover that the plaintiff, their assignee, is in any better position than the mortgagee would be if party plaintiff. There is no question of an innocent good-faith purchaser for value in the case. And the evidence shows that the horsepower was worth more than the amount of the second note.

We have determined this case without the aid of authority. It appears to us that common honesty and fair dealing demands that we should hold that the defendants are entitled to their security unimpaired, or that the value of that part wrongfully appropriated by the mortgagor should be regarded as an extinguishment of the second note.

The judgment of the district court will be REVERSED

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MONTPELIER SAVINGS BANK AND TRUST COMPANY, Appellee, v. LOUISA M. ARNOLD *et al.*, Appellees, AND M. H. PARKS, Appellant.

1. **Mortgage**: FORECLOSURE: AGREEMENT: EVIDENCE. The evidence in this case considered, and *held* to show an agreement between the copartners, Parks & Olney, at the time of receiving a conveyance of the property in controversy, that Parks should assume and pay, as his share of the purchase money for said property, a mortgage thereon of fifteen hundred dollars.

2. ——: ——: PARTIES: RELIEF. In an action to foreclose a mortgage on real estate the defendant O., being the holder of a junior mortgage upon a part of the same premises, filed a cross-petition against his codefendant P. to enforce an agreement made with him by P., whereby he assumed and agreed to pay the mort gage sought to be foreclosed. *Held*, that the cross-petitioner, O., had such an interest in the subject-matter of the action, and said agreement with P. had such relation thereto, as to entitle him to seek relief thereunder in the same action.

3. ——: ——: ——: ——. The above mortgage and agreement being established, *held*, that the cross-petitioner, O., was entitled to a decree awarding him any surplus remaining from the foreclosure sale, after satisfaction of the prior mortgage, and to a judgment against his codefendant, P., for such amount as he should be compelled to pay to protect his lien against plaintiff's mortgage.

4. ——: ——: REDEMPTION: CREDIT ON JUDGMENT. The portion of the mortgaged premises covered by O.'s mortgage was sold separately, and purchased by plaintiff. Within the required period O. redeemed from the sale, but did not enter upon the record the amount he was willing to credit upon his judgment against P. *Held*, that the omission to make such entry did not operate as a satisfaction of O.'s judgment against P.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, OCTOBER 16, 1890.

THIS is an action in equity, wherein the plaintiff obtained personal judgment against defendants, L. M. and J. H. Arnold, upon their promissory note for fifteen

hundred dollars, and a decree as to all the defendants, foreclosing a mortgage executed by L. M. and J. H. Arnold to J. W. Squire, trustee, on the northeast quarter of section twenty-three, township seventy-five, range forty, to secure said note.

Appellee Olney filed his cross-petition against appellants, M. H. Parks and Jacob H. Coffelt, alleging that Parks and Olney, as partners, received a conveyance from said Arnolds of said northeast quarter of section twenty-three, together with other real estate, they assuming the payment of the fifteen-hundred-dollar mortgage to Squire, trustee; that afterwards Parks and Olney conveyed to Coffelt said northeast quarter of section twenty-three, in which conveyance Parks assumed the payment of said fifteen-hundred-dollar mortgage; that on the same day Coffelt executed to appellee his two promissory notes for five hundred and fifty dollars each, and a mortgage on the north half of said northeast quarter, to secure the same, said mortgage reciting that it was second to the mortgage to Squire, trustee, "conveying the northeast quarter of section twenty-three, township seventy-five, range forty, which is assumed to be paid by M. H. Parks;" that on the same day Coffelt executed to Parks his mortgage on said northeast quarter, in which Parks assumed the payment of plaintiff's notes and mortgage; that about July 18, 1885, the firm of Parks & Olney dissolved, each conveying to the other certain real estate belonging to the firm. Appellee Olney asks judgment against Coffelt on the two notes set out in his cross-petition, and that the mortgage given to secure the same be foreclosed; that it be decreed that any sum of money which he may be compelled to pay to protect his title as against plaintiff's mortgage shall be and constitute a judgment against Parks, when such amount is ascertained.

Appellant Parks answered admitting the execution of the notes and mortgages set out in the petition and cross-petition; and, answering the cross-petition, insists that Olney had no cause of action against him affecting

the subject-matter of the action brought by plaintiff, and, therefore, no right to maintain his cross-action; that if he has any cause of action it is at law; that he, Parks, never assumed the payment of plaintiff's mortgage with Olney, but only assumed the payment thereof for the benefit of Coffelt, and that there was no consideration for such promise to Olney; that, in the conveyance of Parks & Olney to Coffelt, the premises were conveyed as to Olney, subject to plaintiff's mortgage, and that the mortgage from Coffelt to Olney was accepted and received by Olney as second to plaintiff's mortgage; that the agreement of Parks to assume plaintiff's mortgage was solely between him and Coffelt, and to which Olney was not a party; and that Olney was not entitled to recover as prayed for in his cross-petition.

On February 24, 1888, the case came on to be heard upon the cross-petition and answer of Parks, Coffelt having made default, and no one appearing for Parks; and, after hearing the testimony upon the issues joined between Parks & Olney, a decree was entered finding that Parks, for a valuable consideration, agreed to pay the fifteen-hundred-dollar note executed to Squire, trustee, "and now gone to judgment in this action;" that, after said agreement, Olney accepted a junior mortgage on the north half of the northeast quarter, section twenty-three, covered by plaintiff's mortgage, to secure said notes executed by Coffelt; and that "judgment and decree of foreclosure of said note and mortgage has this day been entered." It was decreed and adjudged, "That any sum of money which the said J. J. Olney may have to pay in redeeming from the fifteen-hundred-dollar mortgage of plaintiff, foreclosed herein, to protect his title to the north half of the northeast quarter, section twenty-three, township seventy-five, range forty, he shall recover from the defendant, M. H. Parks, with interest and costs of proceedings on the cross-bill herein, and that this cause shall be continued until said amount be ascertained."

Parks filed his motion to set aside the default and decree, which was sustained, and the cause again submitted on the issues joined upon cross-petition. By the answer of Parks, December 7, 1888, a decree was entered affirming the decree of foreclosure of the mortgage from Coffelt, on the north half of said northeast quarter, as entered February 24, 1888, and decreeing that said north half be sold, and the proceeds, or so much as shall be necessary, be applied in payment of plaintiff's lien, as decreed February, 1888, and that the remaining portion of the proceeds, if any, be applied in payment of said judgment in favor of Olney against Coffelt, entered February 24, 1888; and if said north half shall not sell for sufficient to extinguish both judgments, but shall sell for an amount equal to the judgment in favor of Olney against Coffelt, together with costs accrued and accruing, then Parks to pay Olney such portion of his judgment as may remain against Coffelt, together with the costs, after applying the proceeds as before directed. But if the lands sell for less than the judgment held by Olney against Coffelt, together with costs, then Parks to pay Olney the amount of such sale, less any amount thereof that may remain to be applied on said judgment held by Olney against Coffelt, for removing the lien on said land of the judgment held by plaintiff. It was ordered that special execution issue for the sale of said north half of said northeast quarter.

On February 12, 1889, defendant Coffelt filed his motion supported by affidavit to require satisfaction of the judgment rendered against him, and in favor of Olney, but as he has dismissed his appeal, the motion does not demand further notice. On the same day appellant Parks filed his motion to vacate and set aside certain parts of said decree, and for satisfaction thereof, which motion was overruled. The case is now before us on the appeal taken by M. H. Parks, upon the issues joined to the cross-petition of Olney, and upon the motion of Parks to vacate and satisfy the decree.

Fremont Benjamin and *Walter I. Smith*, for appellant.

Frank Shinn and *L. W. Ross*, for appellee.

GIVEN, J.—I. It is not questioned but that, in receiving title from Arnolds and in conveying to Coffelt, the firm of Parks & Olney assumed and agreed to pay the mortgage debt to Squire, trustee. The contention is, whether Parks agreed with Olney, for a consideration, that he would pay that debt. The testimony shows that they were equal partners; that Parks' means were limited compared to those of Olney, and that, in the exchange of properties with Arnolds, Olney put in about two hundred acres of his own land, valued at seven thousand dollars, and afterwards paid to Arnolds five hundred dollars, as against thirteen hundred dollars, and two years' interest on the fifteen hundred dollars, paid by Parks. These facts are strongly corroborative of Olney's claim that Parks agreed to pay the Squire mortgage on account of his share of the purchase price of the lands received from Arnolds. He is further corroborated by the fact that in their deed to Coffelt, and in the mortgage from Coffelt to Olney and Parks, it is recited that Parks assumed to pay the mortgage to Squire, trustee. The subsequent agreement between Parks and Coffelt that, upon Coffelt's paying the Squire mortgage, Parks would release his mortgage from Coffelt, is also corroborative of what Olney claims. Parks contends that the recitals in the Coffelt deed and mortgages were because of the agreement between him and Coffelt; that Olney was not a party to that agreement; that it was for the benefit of Coffelt, and that Olney is not entitled to any rights under it. The facts do not sustain this claim. The agreement with Coffelt was not made until January, 1887, while the deed and mortgage were made in 1885.

1. MORTGAGE: foreclosure: agreement: evidence.

Olney offered in evidence certified copies of the deed to Coffelt, and of the mortgage from Coffelt to

Parks, to which Parks objected as incompetent, and not the best evidence. We are entirely satisfied from the other evidence that Parks agreed with Olney to pay the Squire mortgage, and, therefore, without determining whether these copies were admissible, we do not consider them in passing upon the question now under notice. The testimony as to the settlement of the partnership is indefinite, and not such as, taken alone, would show that Parks assumed to pay the Squire mortgage, but, taken in connection with the other facts to which we have referred, we think it is established by decided preponderance of the evidence, that Parks did so agree, on account of his liability to pay half the purchase price to Arnold.

II. Olney's right to judgment and foreclosure on the notes and mortgage executed to him by Coffelt is fully established. The mortgage being upon part of the same land as plaintiff's, though second thereto, gave him an interest in the subject-matter of the plaintiff's action, and, having Parks' agreement to pay the debt due the plaintiff, he has a cause of action against Parks relating to the same subject-matter, and which he may maintain in this action.

2. —: —: parties: relief.

III. When Olney took the mortgage from Coffelt as second to plaintiff's he had the agreement of Parks to pay the prior mortgage. Without that agreement he would only be entitled to the rights of a junior mortgagee, but with it he is entitled, as between him and Parks, to have Parks pay the prior mortgage. Parks failed to pay it; hence, the plaintiff was entitled to foreclosure and sale, and Olney, as a junior lienholder, to any surplus that might arise from the sale, and, as against Parks, to judgment for whatever amount he had to pay to protect his lien against plaintiff's mortgage. It is contended that the decree of the district court grants relief not asked. We think the decree is in exact accord with the rights of the parties and with the prayer of the cross-petition.

3. THE same.

IV. Upon the hearing of Parks' motion to vacate and satisfy the judgment and decree, it was shown that the land covered by the plaintiff's mortgage was sold upon special execution in favor of plaintiff; that the part covered by Coffelt's mortgage to Olney was sold separately, and purchased by plaintiff; that within the period for redemption Olney paid to the clerk the amount necessary to redeem the land covered by his mortgage and decree from said sale, but did not enter upon the record any statement of the utmost amount that he was willing to credit upon his judgment. Parks contends that, under the provisions of the statute, this operates as a satisfaction of the judgment in favor of Olney, and that the same should be canceled. While Coffelt or his creditors might be heard to urge such a demand, surely Parks had no right to a satisfaction of that judgment. Olney's redemption was not a waiver or abandonment of his rights under the agreement with Parks. He was compelled to pay the amount that he did because of Parks' failure to perform his agreement. So much of the motion as asks that certain parts of the decree be vacated is sufficiently answered in what we have said as to the decree conforming to the rights of the parties.

4. —: —: redemption: credit on judgment.

We think the motion was properly overruled, and that the decree of the district court should be AFFIRMED.

C. R. FRANK, Appellee, v. JAMES HOLLANDS *et al.*, Appellants.

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1. **Practice in Chancery: SUBMISSION OF QUESTIONS TO JURY: APPEAL.** The submission of questions of fact in an equity cause to a jury for determination, though contrary to the rules of practice prescribed by the Code for the court of chancery, will not have the effect to transfer the case to the law side of the court, nor to deprive the parties, upon appeal, to a trial *de novo* in the supreme court.

2. ———: RECORD: BILL OF EXCEPTIONS. In actions triable *de novo* in the supreme court it is sufficient, under Code, section 2742, as amended, if the evidence is made a part of the record within the six months allowed for appeal, and this rule cannot be changed by an order of the trial court prescribing a shorter period in which a bill of exceptions may be filed.

3. **Promissory Note**: SIGNATURE IN BLANK: ALTERATION: INNOCENT PURCHASER. One who signs a promissory note in blank cannot be heard to complain, as against a *bona fide* purchaser thereof before maturity, that the amount afterwards inserted therein was not according to the agreement between himself and the payee.

4. **Mechanic's Lien**: IMPROVEMENTS BY HUSBAND ON WIFE'S PROPERTY. Where improvements upon the property of a married woman are contracted for by her husband, with the knowledge and consent of the wife, and the latter permits the erection of such improvements without objection on her part, the premises will be subject to a mechanic's lien therefor as provided by law.

Appeal from Osceola District Court.—HON. C. H. LEWIS, Judge.

THURSDAY, OCTOBER 16, 1890.

ACTION to recover the amount of a promissory note, and to foreclose a mechanic's lien. A decree was rendered in favor of the plaintiff. The defendants appeal.

D. D. McCallum, for appellants.

C. M. Brooks, for appellee.

ROBINSON, J.—The note in suit purports to have been given for ninety-three dollars and thirteen cents by the defendant, James Hollands. It was given for lightning rods erected upon a dwelling-house owned by his wife and codefendant, Hulda Hollands. Plaintiff asks judgment for the amount of the note against both of said defendants, and the foreclosure of a mechanic's lien on the building and land upon which it is located. The answer of Hulda Hollands is a general denial. James Hollands alleges in his answer that the note as originally drawn and signed was for thirteen dollars, and that since it was made it has been changed without his knowledge or consent, so as to appear to have been

given for ninety-three dollars and thirteen cents; that plaintiff is not an innocent purchaser for value, and that the note is the property of the original payees, Cole Bros.

On a motion of James Hollands to transfer this cause so far as it related to him to the law side of the docket, it was "ordered that the question of fact could be submitted to the jury" at his request. A jury was impaneled, and, after the evidence was introduced, they were requested to answer three interrogatories. They answered in substance that the words "ninety-three" which appear in the body of the note were not written therein when it was signed by Hollands; that they have not been changed since they were written; and that the figures in the upper left-hand corner of the note when first written therein were "13.13." The plaintiff thereupon filed a motion for judgment on the special findings, and the motion was sustained. Additional evidence was offered on the issues presented by the answer of Hulda Hollands, and on the twenty-third day of March, 1889, judgment was rendered in favor of plaintiff and against defendant, James Hollands, on the note in suit, for one hundred and one dollars and sixty-five cents and costs, and in favor of plaintiff and against defendant, Hulda Hollands, for ninety-three dollars and thirteen cents, and interest, and a mechanic's lien for the amount of the judgment against James Hollands established, and a sale of the premises ordered.

I. Appellee contends that the evidence introduced on the trial in the district court was not so preserved, and made a part of the record, as to authorize a trial *de novo* in this court of any part of the cause, and that as to appellant, James Hollands, the cause was tried in the court below as at law, and cannot be reviewed on errors assigned as far as they are based upon the evidence.

1. PRACTICE in chancery: submission of questions to jury: appeal.

We do not understand from the record that the case as to James Hollands was treated and tried as an action at law, but rather that certain questions of fact

were submitted to a jury for determination. That practice was authorized by the revision of 1860, and is in harmony with the earlier chancery practice. The verdict of the jury was designed to inform the conscience of the chancellor, and might be followed or disregarded as he deemed proper. *McDaniel v. Marygold*, 2 Iowa, 502; Revision of 1860, sec. 2999. In such cases this court was not deprived of jurisdiction to try the case *de novo* on appeal. *Chambers v. Ingham*, 25 Iowa, 225. But it was held in *Hobart v. Hobart*, 51 Iowa, 512, that the Code of 1873 so changed this practice as to require issues of fact in equitable actions to be tried by the court. The court below, therefore, erred in submitting any of the issues to a jury, but appellants do not complain of that action, nor do they complain that the cause as to James Hollands was not fully transferred to the law docket, and tried as an action at law.

Although the court sustained the motion for judgment in favor of plaintiff and against James Hollands on the special findings, yet it is evident that the special findings alone did not warrant such judgment, but that the special findings were considered in connection with the evidence submitted, and that the judgment rendered against the husband was in fact based upon the evidence and perhaps the second special finding. But whatever the facts may be, we are of the opinion that the entire case is here for trial *de novo*, if the evidence has been properly preserved, and that no part of it is triable on errors assigned.

II. It appears that when judgment was rendered the court ordered that defendants have sixty days in which to file a bill of exceptions. The bill of exceptions was not filed until the nineteenth day of June, 1889, or more than sixty days after the order was made. It was what is known as a skeleton bill. On the third day of August, 1889, the defendants filed the short-hand reporter's translation of the evidence. The abstract purports to contain all the evidence offered and introduced, with the objections

2. ——: record: bill of exceptions.

thereto, and the appellee does not claim that all the evidence introduced and all the evidence offered is not before us, although he has filed an additional abstract. We, therefore, conclude that all the evidence offered on the two trials in the court below is set out in the record in this court.

It is manifest that if the case were not triable here *de novo*, under numerous decisions of this court the evidence could not be considered, because not made a part of the record within the time fixed by the order of court. But in equitable actions, triable *de novo* in this court on issues of fact, it is sufficient if the evidence is made a part of the record within the six months allowed for an appeal. Code, sec. 2742, as amended. Since that statute fixes that time within which the evidence must be made of record, it is not competent for the court to make it less, and the order of the court in this case limiting the time to sixty days was, therefore, of no effect.

III. There is an irreconcilable conflict in the evidence as to the contents of the note in suit when it was signed. Two witnesses testify positively that the note was then drawn as it now appears, while James Hollands swears that it was not, and that the words "ninety-three" which make the note read: "I promise to pay to Cole Bros., or bearer, ninety-three dollars and thirteen cents," etc., were not then inserted. Before the rods were erected, and the note was given, James Hollands signed an order by which he agreed to pay sixty-seven cents per foot for the rods which should be erected. It is not disputed that one hundred and forty-seven feet of rods were erected under the order, and that the price thereof would aggregate more than the amount of the note. The note was given after the rods were erected. After it was signed by the husband, the wife was asked to sign it, and was about to do so, when she was dissuaded by her husband. He gives as a reason for wishing his wife not to sign that he "knew he was bit, and didn't want to get bit any more," although he claims that he

8. PROMISSORY note: signature in blank: alteration: innocent purchaser.

was to pay but thirteen dollars for the rods, and had signed a note but for that amount. About the time the note became due it was presented to him for payment. He then examined the note but made no objection to it, and said he would pay it if he had the money. At that time the note was in its present condition. We conclude that a preponderance of the evidence shows that there has been no alteration of the note. But if it had in fact been altered, as claimed by appellants, it would appear in that case that it was but little more than a blank when signed. It is shown that the plaintiff purchased it before maturity for value without knowledge of the alleged alteration. Under these circumstances James Hollands could not be heard to deny the making of the note.

IV. The pleadings show the filing of a statement for a mechanic's lien for the amount in controversy.

4. MECHANIC'S lien: improvements by husband on wife's property.

Hulda Hollands denies that she authorized her husband to contract for the rods in question, but there is evidence which tends to show that she was consulted about the rodding before it was done, and agreed to it; and she admits that she was present when the rods were put up, and made no objection to what was being done.

Our conclusion upon the entire record is that the judgment of the district court is correct. It is, therefore, AFFIRMED.

ELLEN S. WINTERMUTE, Appellant, v. B. F. HEINLY, Executor, Appellee.

Will: CONSTRUCTION: EQUITY. One claiming to be an heir of a testator, and also a devisee and legatee under his will, is entitled to maintain a suit in equity to obtain a construction of such will, and have his interest as devisee and legatee, if the will be valid, or as heir, if it be invalid, determined, and have an accounting with the executor for his share in the estate, and an order for the payment of the same.

Appeal from Muscatine District Court.—HON. A. HOWAT, Judge.

FRIDAY, OCTOBER 17, 1890.

ACTION in chancery for the construction of a will. A demurrer to the petition was sustained. Plaintiff appeals.

Richman & Burk and *E. F. Richman*, for appellant.

J. H. Monroe and *Jayne & Hoffman*, for appellee.

BECK, J.—I. The petition alleges that plaintiff is an heir, devisee and legatee of Joseph Heinly, her deceased father. She sets out a copy of the will, which, she alleges, is uncertain and ambiguous in its provisions, and doubtful as to its interpretation. The will is shown to contain divers devises and bequests to the testator's heirs, but provides that the executor, who is made a defendant, shall hold the share of one of the heirs in trust, and that the entire income of the estate be paid to testator's wife; and that the devises and bequests take effect at the expiration of ten years after the testator's death. The provisions of the will need not be further recited. It is alleged in the petition that the executor has advanced divers sums of money to certain heirs and devisees. The relief prayed for is that the will be construed, if it be found valid as to plaintiff's interest, and, if found so uncertain and ambiguous that the testator's intentions cannot be discovered, it be set aside; and, if the will be supported, it is prayed that the executor be required to account for moneys paid by him, and that he be required to show what sums are due to plaintiff, and be required to pay the same. General equitable relief is also prayed for in the petition.

II. In a case quite like in its facts to the one before us this court has construed a will in an action brought by heirs, legatees and devisees. *Howard v. Smith*, 78

Iowa, 74. That parties so interested in an estate may maintain such an action is recognized by other authorities. *Wager v. Wager*, 89 N. Y. 161; 1 Williams, Ex'rs, 294; 6 Wait, Act. & Def. 381; 3 Wait, Act. & Def. 146. Two New York and two Ohio decisions are cited to support a different rule. We think they are not in conflict with the rule recognized by this court. *Bailey v. Briggs*, 56 N. Y. 407; *Chipman v. Montgomery*, 63 N. Y. 221; *Corry v. Fleming*, 29 Ohio St. 147; *Bowen v. Bowen*, 38 Ohio St. 426.

III. It will be observed that plaintiff is interested in the property of the estate as a devisee, legatee or heir; that the executor has paid money of the estate to heirs and devisees. It is shown by the petition that plaintiff has an interest in the property of the estate, which is held by the executor. Plaintiff prays that her interest therein may be determined, and that the executor may be required to show what sums are due to her, and that he be required to pay the same. She prays also for general relief. It cannot be doubted that the petition shows a cause of action under which the plaintiff is entitled to the relief prayed for in the petition. She is entitled to call upon the executor who holds funds and property in which she has an interest to disclose that interest, and account therefor, and to pay any sum that may be found due her. It is plain that the relief to which plaintiff may be entitled cannot be determined without an interpretation of the will. If it be so ambiguous and uncertain as to be void, her interest is that of an heir; and, if the will be sustained, her interest, and the time when distribution under it shall be made, will be determined by the interpretation put upon its provisions. These considerations lead us to the conclusion that the court below erred in sustaining defendant's demurrer to plaintiff's petition. REVERSED.

W. G. PEET, Appellee, v. MATILDA PEET, Appellant.

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1. **Antenuptial Agreement: VALIDITY.** An antenuptial agreement provided, that the parties thereto should not in any manner be restricted in the control or disposition of their respective properties; that the woman thereby released all right of dower or homestead in the property of her prospective husband, and in lieu thereof should receive, in case she survived her husband, the interest on the sum of three thousand dollars from the date of the latter's death, to be paid annually so long as she remained his widow. *Held*, that in view of the circumstances, that at the time of the agreement both parties were over fifty years of age, the man, a widower with three children, and worth about fifty thousand dollars, the woman without property, and dependent upon her brother and her personal earnings for support; that the parties having been acquaintances and neighbors for a number of years, the woman might be presumed to know the amount of the other's property; and that the woman had a general knowledge of the rights she would have, as wife, in such property; the agreement was not so illiberal as to raise a presumption of the use of undue influence over the woman, nor was it so unreasonable and unconscionable that it ought not to be enforced, and the evidence fails to show any undue influence in fact.

2. ——— : **ABANDONMENT.** The joinder of the wife with her husband in executing conveyances of real estate, which might under said agreement have been executed without her, will not operate as an abandonment of said contract.

3. ——— : **HUSBAND'S DESERTION OF THE WIFE.** The removal of the husband during his last illness, with his consent, to the home of his son, to the end that he might be better cared for, his wife being unable to care for him without the assistance of neighbors, and her nervous condition being such as to render her presence irritating to her sick husband, was not such a desertion of the wife by the husband as to prevent the enforcement of the above agreement.

4. ——— : **RIGHTS OF DEVISEE TO ENFORCE.** A devisee under a will is entitled to have his title to real estate so received quieted as against any claims of the wife of the testator, who has released by an antenuptial agrement the interest which the law secures to the wife in the estate of her husband.

Appeal from Jones District Court.—HON. J. D. GIFFEN, Judge.

FRIDAY, OCTOBER 17, 1890.

THE plaintiff claims title to certain real estate, as legatee under the will of James M. Peet, deceased, and asks to have his title quieted as against appellant, the widow of said deceased. The plaintiff's claim for this relief is based upon an antenuptial agreement entered into between the deceased and appellant before their marriage. The appellant admits, upon production of the instrument, that she signed the same, but alleges, as defense thereto, that it was obtained by James M. Peet taking advantage of the confidential relation existing between them, by undue influence, and that the contract is unfair, unconscionable and void; that the deceased repudiated and abandoned said contract, and that he deserted her prior to his death; and that the plaintiff is not entitled to enforce said contract. A decree was entered in favor of the plaintiff granting the relief demanded, from which the defendant appeals.

Remley & Ercanbrack and *F. L. Weaver*, for appellant: When an antenuptial contract is set up against the woman's claim for dower, the burden is upon those who allege it to affirmatively prove that the husband acted in perfect good faith, and took no advantage of his influence or knowledge, and that the contract was fair, adequate and equitable. *Appeal of Patrick Shea*, 121 Pa. St. 302. The presumption is against the validity of such a contract. *Pierce v. Pierce*, 71 N. Y. 154; 2 Pom. Eq. Jur., pars. 956, 957. There can be no such contract between the two except after the fullest and fairest explanation of every particular, resting in the breast of the one who seeks to establish the contract with the person so trusting him. Bishop's Equity, sec. 323. A contract entered into before, and in consideration of, marriage, which is fair and reasonable in itself, and free from fraud and imposition, will be enforced. *Jacobs v. Jacobs*, 42 Iowa, 600. A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence

over the conduct of another. A husband occupies such a relation to the wife. *Boyd v. De La Montague*, 73 N. Y. 498; *Darlington's Appeal*, 86 Pa. St. 512; *Kline v. Kline*, 57 Pa. St. 120. There was a deliberate premeditated abandonment of the appellant by her husband, and, under the law announced by this court, when he died, neither he nor his representatives were in a position to enforce the antenuptial contract. *York v. Ferner*, 59 Iowa, 487. The appellee stands in the same position as any stranger would, who had been made a legatee in the will of deceased, and is not in a position to demand that equity shall enforce this contract. *Merritt v. Scott*, 6 Georgia, 563; *Goodwin v. Goodwin*, 1 Ves. Sen. 228; *Byas v. Byas*, Ves. Sen. 164; *Price v. Jenkins*, L. R. 4 Ch. D. 483.

Ezra Keeler and *J. W. Jamison*, for appellee: All agreements and negotiations preliminary or contemporaneous to the written contract are merged therein, and the party signing a contract without having read it or taken precautions to ascertain its contents is bound thereby. *McCormick v. Molling*, 43 Iowa, 561; *McKinney v. Herrick*, 66 Iowa, 414; *Minneapolis & St. Louis Ry. Co. v. Cox*, 76 Iowa, 306; *Barnes v. Insurance Co.*, 75 Iowa, 11. An antenuptial contract, fully understood and fairly entered into without fraud, is valid, and it will be enforced. *Mahaffy v. Mahaffy*, 63 Iowa, 55; *Jacobs v. Jacobs*, 42 Iowa, 600; *Barth v. Lines*, 118 Ill. 374; 59 Am. Rep. 374. The words, "so long as she remains a widow," are not in restraint of marriage. *Hibbitts v. Jack*, 97 Ind. 570; 49 Am. Rep. 478. It could make no difference that the word "dower" was used in the contract. *Daugherty v. Daugherty*, 69 Iowa, 677; *Mock v. Watson*, 41 Iowa, 241. The fact that it was a marriage of convenience is a controlling circumstance upon the good faith and fairness of the antenuptial contract. *Mahaffy v. Mahaffy*, 63 Iowa, 55. The denial in defendant's answer is not sufficient to put in issue the genuineness of the signature. Code, sec. 2730; *Douglass v. Matheny*, 35 Iowa,

112; *Hall v. Ætna Manuf. Co.*, 30 Iowa, 215; *Loomis v. Metcalf*, 30 Iowa, 382. The authorities are uniform that the promise of marriage is a sufficient consideration to support the contract. *York v. Turner*, 59 Iowa, 487.

GIVEN, J.—I. The agreement in question provides, "that, in consideration of the promise of marriage by and between said parties, it is hereby mutually agreed by and between said parties, that during their marriage neither party shall, in any manner, be restricted in the control or disposition of their property, both real and personal, which they now have or may hereafter acquire; and either may execute deeds of conveyance without the consent or signature of the other, the same as if unmarried. And said second party, in consideration of the aforesaid, hereby agrees to claim no right of dower or homestead in or to any property which shall belong to the estate of said party of the first part at the time of his decease, provided she shall survive him. And said first party, in consideration of the promises aforesaid, hereby agrees that, in case that said second party shall survive first party, said second party shall be allowed and paid, out of the estate of said first party, by his executor or heirs, the interest on the sum of three thousand dollars ($3,000), which interest shall be paid annually from and after my decease, during the widowhood of said second party."

1. ANTENUPTIAL agreement: validity.

This agreement was executed and acknowledged July 3, 1877. The parties had resided in the same vicinity, and had been acquainted for about twenty-five years, a part of the time being near neighbors. At the time the agreement was signed, Mr. Peet was a widower, fifty-six years old, with a family of three children. The eldest, the plaintiff, was married and living in his own home; the second, a son, then about of age, and the youngest, a daughter, aged thirteen, residing with their father. Mr. Peet then, and at his death, owned property worth fifty thousand dollars or more. The appellant was fifty-two years old. She had been divorced

from a former husband some thirty years previous; had resided for twenty-five years in the family of her brother, receiving her support from him and her earnings, and was without property or money. A few weeks before their marriage, Mr. Peet took appellant to his home, as company for his daughter, and soon thereafter they agreed to get married, and were married July 5, 1877. On July 3, Mr. Peet and his attorney, who had prepared the agreement, and who was a notary, called on appellant at her brother's home, and after the agreement was read in the hearing of both parties it was signed and acknowledged. Nothing was said at that time about Mr. Peet's property, appellant's interest therein, nor the effect of the agreement. Mrs. Peet testified that she did not understand that she was only to be provided for while she remained unmarried, nor about having the interest on three thousand dollars; that she signed the paper because of her confidence in Mr. Peet. It is contended on her behalf that she was inexperienced in business affairs; that Mr. Peet was an experienced business man, and that he procured appellant to sign the agreement without informing her as to the extent of his property, what her rights in it would be, or the effect of the agreement, and that she signed it without inquiry, because of their relation and the confidence she had in him that he would not ask anything of her but what was fair and just; that, in view of all the circumstances, the agreement is unfair and unconscionable, and should not be enforced.

Though both were advanced in years, yet their relation was one of confidence, and called for the utmost frankness and good faith on the part of James M. Peet. Appellant's long acquaintance with deceased and his family warrants the conclusion that she had a general knowledge as to the extent of his property. Her testimony discloses a degree of intelligence and knowledge of facts that satisfy us that she had a general knowledge of the rights that she, as his wife, would have in his property. Though the agreement was not

discussed at the time it was executed, it was evidently the subject of a previous understanding. It is not likely that Mr. Peet would have presented it for her signature with nothing more said than was said at that time, without a previous understanding that an agreement was to be made Mr. Myrick testifies that, a week or two before the marriage, Mr. Peet told him about the contract that was made, and that thereafter, on the same day, appellant told him she was to have the interest on fifteen hundred dollars. Myrick says the amount was increased after that, and that Mrs. Peet seemed satisfied with the amount. That Mrs. Peet understood the agreement, is not only shown by these previous conversations, and the fact that it was read in her hearing, but by her statement, on the day of her marriage, as a reason why her mother was not present, "that she did not like it because she had signed away her rights there with Mr. Peet." That she made this statement is satisfactorily established by two witnesses, notwithstanding Mrs. Higby, who is said to have been present says she did not hear it, and Mrs. Peet denies having made it.

It is argued that the agreement is so illiberal in its provisions for the support of appellant as to evidence that she acted under undue influence in executing it, and that it is so unreasonable and unconscionable that it should not be enforced. It cannot be said that the provision for Mrs. Peet's support is liberal, and yet it was such an agreement as the parties were at liberty to make, and as the law will sustain when fairly made. Appellee urges that it was not illiberal, because it does not bar appellant of her rights in the personal assets of the estate. As this question only arises incidentally, and all the legatees are not parties to this action, we do not pass upon it.

In view of all the circumstances, we do not think the agreement is so unreasonable as to show undue influence. Mrs. Peet had not contributed to the accumulation of the estate, and was not likely to aid in its

enhancement. She was without a home, or means of support of her own, except her earnings. Her ability to earn a living would decrease with increasing years. By this agreement, and marriage, she was assured of a home, support and companionship with the man of her choice, and the interest on three thousand dollars after his death, so long as she remained his widow. Meager as this provision is, yet it was reasonable that in her circumstances she should be willing to accept it. The circumstances did not call for special liberality on the part of Mr. Peet. It was reasonable that he should desire that no part of his estate should pass to strangers, through his wife, to the prejudice of his children. While a more liberal provision for appellant's support would meet with ready approval, we cannot say, upon the record, that Mrs. Peet was induced to execute the agreement by undue influence, or in ignorance of its general effect, nor that it is so unconscionable that it should not be enforced.

II. It appears that during their married life the appellant joined the deceased in executing conveyances of real estate, and it is argued that he thereby repudiated and abandoned the contract. While, under the agreement, he might have executed conveyances without her joining, yet the mere fact that she did join in such conveyances was not an abandonment of the agreement.

2. ——: abandonment.

III. It appears that the deceased was ill at his own home for a number of weeks prior to his death, and that about ten days prior thereto he was, with his consent, removed to the home of his son, the appellee, against the wishes of Mrs. Peet. The reasons given for this removal are that there was no one to care for him at his own home except Mrs. Peet, with such assistance as might be given by members of the family, and neighbors coming in from their homes. It is also argued that Mrs. Peet's nervous condition was such as to render her actions and presence irritating and prejudicial to the sick man. It is argued that by this removal the deceased deserted

3. ——: husband's desertion of the wife.

his wife prior to his death, and, therefore, the contract should not be enforced against her. It is very clear that there was no such desertion as would affect the force of this agreement.

IV. It is contended that the plaintiff is not within the scope of this contract, and cannot enforce the same.

4. ——: rights of devisee to enforce.

The plaintiff is asking to quiet his title as against the rights of appellant in the estate of her husband. The extent of those rights is dependent upon the validity of this agreement. Appellee is not a mere stranger to the contract. We have no doubt of the right of appellee to be quieted in his title as against the claims of the appellant, provided the antenuptial agreement is binding upon her, and, deeming it binding, our conclusion is that the decree of the district court should be AFFIRMED.

F. A. COMFORT, Appellee, v. L. D. KITTLE, Appellant.

1. **Criminal Procedure:** WITNESSES: RECOGNIZANCE: STATUTE. Section 4385 of the Code being an exact transcript of section 4744 of the Revision of 1860, except in the substitution of the word "cognizance" in the later statute for "recognizance," and from the inapplicability of a cognizance to the evident purposes of the statute, the above change of words must be deemed to have been made by mistake in transcribing the section of the revision, and the section as it now stands in the Code is to be construed as authorizing courts and judges to require a "recognizance" for the appearance of witnesses in criminal proceedings.

2. ——: ——: ——: ORDER AT CHAMBERS. An order requiring a witness to enter into a recognizance for his appearance may be made by a judge at chambers, in a distant county, without notice to the witness, and without his being heard.

3. ——: ——: BOND WITH SURETIES. Section 4385 of the Code does not authorize district courts or judges to require of witnesses written undertakings, *with sureties*, conditioned upon their attendance at criminal proceedings, nor to order their arrest and imprisonment as security for such attendance. The provisions of sections 4248 to 4251 of the Code, giving such authority to magistrates on preliminary examination, are not applicable to judges of the district court.

Appeal from the Superior Court of Council Bluffs.
HON. E. E. AYLESWORTH, Judge.

FRIDAY, OCTOBER 17, 1890.

PROCEEDINGS in *habeas corpus*. The case is submitted on an agreed abstract which shows that plaintiff presented his petition, alleging that he was illegally restrained of his liberty by the defendant by virtue of the order hereinafter referred to. Defendant answered, denying the illegality of the restraint, and alleging that he detained the defendant for refusing to comply with said order. On the hearing the plaintiff testified that he had no knowledge of an application for said order until the defendant had him arrested, and that on the nineteenth or twentieth of May, 1889, he was served with a subpœna in the case of State of Iowa *v.* P. Cadwell and W. C. Cadwell, for the September term, 1889, of the Monona county district court. Defendant introduced the order under which he held the plaintiff, and his return thereon, which is as follows:

"Application having been made this day to me requesting that witnesses, F. A. Comfort and John X. Aleck, be required to enter into recognizance for their appearance as witnesses in the case of the state of Iowa against P. Cadwell and W. C. Cadwell, now pending in the district court of Monona county, state of Iowa, where the same has been transferred by change of venue from the Harrison county district court, the undersigned, having found the application sufficient, makes the following order: *First.* That John X. Aleck and F. A. Comfort each execute a bond in the sum of three hundred and fifty dollars to the state of Iowa, with sureties, to be approved by the clerk of the district court of the state of Iowa for Monona county, conditioned that they will appear as witnesses in the said cause of the State of Iowa *v.* P. Cadwell and W. C. Cadwell, at the first day of the September term of the district court of said Monona county, Iowa, in and for

the year 1889, and not depart therefrom until further ordered by the court. *Second.* That the sheriff of Monona county, Iowa, is hereby authorized and ordered to serve this order on the said F. A. Comfort and John X. Aleck, and personally require them to execute their said bonds in accordance with this order, and, upon their failure so to do, to arrest the said F. A. Comfort and John X. Aleck, and keep them in his custody until they comply with this order or be otherwise legally discharged.

"Done at Sheldon, Iowa, this twenty-third day of May, A. D. 1889.

"[Signed.] SCOTT M. LADD,
"Judge Fourth Judicial District of Iowa."

EXHIBIT "B."

"STATE OF IOWA, } ss.
"Monona County, }

"I, L. D. Kittle, sheriff of Monona county, Iowa, hereby certify and return, that the annexed order came into my hands for service on the twenty-fourth day of May, A. D. 1889, and in compliance with said writ he (F. A. Comfort) refused to give bond, and I arrested him, the said F. A. Comfort, on the twenty-ninth day of May, A. D. 1889, in the town of Logan, Harrison county, Iowa, and I now hold him for the further order of this court. L. D. KITTLE,
"Sheriff."

There being no further testimony Judge AYLESWORTH ordered that the plaintiff be released and discharged, from which defendant appeals.

C. E. Underhill, County Attorney, for Monona County.

S. H. Cochran and *Joe H. Smith*, for appellant.

J. W. Barnhart and *L. R. Bolter & Sons*, for appellee.

GIVEN, J.—I. The power to require persons, without accusation of wrong and without a hearing, to give

1. CRIMINAL procedure: witnesses: recognizance: statute.

even their own pledge for their appearance as witnesses, is surely an extraordinary power, and still more extraordinary when security may be required and imprisonment imposed for a failure to give it. The power to bind witnesses by recognizance to appear and give evidence has long since been conferred upon courts and judges by the statutes of many, if not all, of the states. We are not aware that it has ever been exercised in the absence of statutory authority. It is a familiar rule that when the statute confers authority upon any given subject it is to the exclusion of all other authority than that expressed in the statute. The question before us is whether, under the law and facts, Judge LADD had authority to make the order under which the petitioner is detained.

In the chapter of the Code authorizing changes of venue in criminal cases from one county to another, it is provided in section 4385, that when any prosecution has been transferred, the accused shall give bond for his appearance. "And the court or judge may require all material witnesses, in behalf of the prosecution, to enter into cognizance for their appearance at the district court of the county to which the prosecution is transferred." This section is an exact transcript of section 4744 of the revision, except that the word "recognizance" is used in the revision, instead of "cognizance," as in the Code. Lexicographers define cognizance to mean, in law, knowledge or notice; judicial knowledge or jurisdiction; an acknowledgment or confession, as an acknowledgment of a fine. Recognizance is defined to be, an obligation of record entered into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the same or some other court, to keep the peace or pay a debt. In view of these definitions, and the inapplicability of a cognizance to the evident purposes of the statute, we are satisfied that this change of words occurred by mistake in transcribing the section of the revision, and that section 4385 of the Code should

be construed as authorizing courts and judges to require recognizance.

II. Some question is made as to whether the case against Cadwells was a criminal prosecution. While it is not so stated in terms, we think it fairly appears from the record that it was a criminal prosecution, and that petitioner was deemed a material witness for the prosecution.

2. ——: ——: ——: order at chambers.

The petitioner claims that the order is illegal because made at chambers, distant from Monona county, without notice to him, and without his being heard. The proceeding is summary; no provision is made for notice or hearing. Judge LADD might make whatever order he had power to make when, where and as this one was made.

III. The material question is whether Judge LADD had authority to require the petitioner to execute a bond with sureties, conditioned that he would appear as a witness, and to order that, upon failure, he be arrested and kept in custody.

3. ——: ——: bond with sureties.

From what we have said, it will be seen that we regard the judge as having authority to require the petitioner to enter into recognizance. There is a difference between a recognizance and a bond. Webster says, "A recognizance differs from a bond, being witnessed by the record only, and not by the parties' seal." He defines a bond to be, in law, "A writing under seal by which a person binds himself, his heirs, executors and administrators." It is certainly questionable whether authority to require a recognizance confers power to require a bond, and yet, as it cannot be very material to the witness in which form he gives his obligation, we might not hold the order unauthorized merely because a bond instead of a recognizance is required. It is of grave importance to a witness whether he may be required to give other security than his own promise, and graver still whether for failure, through inability or otherwise, he may be arrested and imprisoned. To require sureties, and to order imprisonment

in such cases, is the exercise of an unusual and extraordinary power, and should not be exercised where the authority is doubtful. The authority being conferred by statute, and the statute excluding all authority not conferred by it, we are to look to it alone.

The statute quoted is the only one conferring power upon district courts and judges in such cases. There is not the remotest reference therein to either sureties, arrest or imprisonment. Sections 4248 to 4251 of the Code do authorize magistrates, on holding the defendants to answer in the district court on preliminary examination, to take from each material witness examined by him, on the part of the state, a written undertaking for his appearance in the district court, and, if satisfied that the witness will not fulfill his undertaking, to require him to enter into it with sureties, and, in case of refusal, to commit him until he comply or be legally discharged. These provisions are expressly limited to preliminary examination before magistrates. If it was intended thereby to confer the same authority upon district judges, in cases of change of venue, there would be no necessity for the provision contained in section 4385 as to witnesses. These provisions being expressly limited to preliminary examinations before magistrates, we are not at liberty to engraft them upon the other statute, even though there are good reasons why district courts and judges should possess the same authority. The powers being statutory, it is for the legislature alone to say who shall possess them, and to what extent. Much is said as to the necessity of the district courts and judges having power to require witnesses to give surety for their attendance, and the failure to detain them in custody to prevent failure of justice. Such arguments are rather for the lawmaking power than for the courts. Statutes conferring such powers as we are considering are justified by necessity, for without them the enforcement of criminal statutes would frequently fail, but while the necessity justifies the law it does not justify the exercise of these powers in the absence of authority in the law.

It is very clear that, taken alone, section 4385 of the Code does not authorize district courts or judges to require sureties from witnesses, nor to order their arrest and imprisonment. In the opinion of a majority of the court such authority in the district courts and judges may not be inferred from the statutes in respect to preliminary examinations, nor from the necessities of the case, and hence that the learned district judge acted without authority in requiring the petitioner to furnish sureties, and in ordering his arrest and detention upon failure so to do.

For these reasons the detention of the plaintiff is illegal, and the judgment of the superior court in ordering his release should be AFFIRMED.

BECK, J. (*dissenting*).—I. I cannot concur in the decision announced in the foregoing opinion of a majority of the court. That opinion rightly holds that the section of the Code before us for interpretation authorizes the district court in a criminal case, wherein a change of venue has been taken, to require material witnesses for the state to enter into recognizances for their appearance at the court to which the cause is sent. The point for determination in this case is this: Does the district court, upon granting the change, have authority under the section to require the witness, who is the plaintiff in this case, to give security, by entering into an undertaking with sureties, for his appearance at the court to which the cause was transferred?

The general definition of the word "recognizance" is correctly given in the foregoing opinion, as an obligation of record entered into before a court competent to take it. But we must inquire what kind of an obligation, and for what purposes it is given, which is contemplated by the section of the Code under contemplation. It is evident that obligations of record, of all forms and for all purposes, are not within the meaning of the statute, and it is equally plain that it contemplates an obligation which is intended by the law to

secure the attendance of the person, giving it as principal, at the court to which the venue of the cause is changed. It cannot be doubted that the recognizance contemplated by the section of the statute under consideration is the kind of a contract, both as to the condition and parties, which the law, either by the express statute, or by the uniform practice of the courts, requires to be given in cases where the appearance of a party or the attendance of a witness, or other person, is required before a court in connection with a case pending therein. Such recognizances are always obligations, the performance of which is secured by bail, who enter into the contract alone or with the principal whose appearance or attendance is required, unless, when, by special statute or practice, the bail may be dispensed with. Hence a recognizance is always spoken of as an obligation or instrument of record wherein bail is given by the party whose appearance is intended to be secured. When the books speak of a recognizance, without more, it is understood that bail is to be given. It is sometimes the practice, when one is indicted for a crime, and the prosecutor and court are satisfied of his innocence, or of the impossibility to convict him, that he is discharged from custody without bail upon his own undertaking to appear at another time. It is presumed that courts have authority to do this. See Abbott's Law Dic., title, Recognizance, p. 387. But surely they have authority when a recognizance is required by the law in a proper case to require bail. The district court in the case before us required plaintiff to give bail.

In support of my position that where a recognizance to secure the attendance of one at court is spoken of in the law it is implied that bail is to be given, unless the contrary is expressed, see 1 Bouvier's Dictionary, title, Bail, p. 153; 2 Abbott's Law Dictionary, Title, Recognizance; 1 Burrell's Law Dictionary, Title, Bail, p. 174; 1 Rapalje & Lawrence, Law Dictionary, title, Bail, 106; *State v. Gorley*, 2 Iowa, 52; Petersdorff on Bail, 509, ch. 5. In my opinion, under the provision of the statute in question (Code, sec. 4385), the district court

was authorized to require bail. That section authorizes the court to require plaintiff to enter into a recognizance; the law contemplates that bail shall be given to secure the performance of the obligation to appear unless the court otherwise order. To my mind it is plain that the order of the district court requiring the plaintiff to enter into a recognizance with bail was made under full authority conferred by section 4385 of the Code.

II. In my opinion, considerations based upon the reason and spirit of this section of the Code, its subject-matter and context, and the remedy provided therein, support the conclusion I reach in this case. It was enacted to confer authority upon the district court to require witnesses for the state in criminal cases to appear at the place of trial when the venue is changed. The purpose and intent of the law, its subject-matter, is the prevention of the defeat of justice by the failure or refusal of the state witnesses to appear at the trial. The impediment in the enforcement of the law arising from this cause has resulted often in the defeat of justice for time out of mind. The reason and spirit of the law demand such interpretation of the section as will prevent the failure of justice in such a way. This court is required to interpret the statute in accord with its reason and spirit, thus securing a remedy which will effectuate its purpose and intent.

III. Other statutes in *pari materia*, intended to compel the attendance of witnesses, may be considered in the support of my conclusions. We must presume that the legislature in the enactment of the section intended that the provision should accord with other like provisions, applicable in the same class of persons, and conform to the practice of the courts, and should be effective in accomplishing the object of the enactment, namely, to compel the attendance of witnesses for the state in cases taken on change of venue to other counties. We will not put a construction upon the statute which will deprive it of all efficiency. The bond or other obligation of a witness, without security, would

not secure the attendance of witnesses who are without pecuniary responsibility, and for any reason would desire the acquittal of the accused. Surely, the legislature did not intend that the statute should be without effect upon this class of witnesses.

IV. In proceedings by preliminary examinations before a magistrate upon committing, or admitting, to bail the accused, the magistrate may require the witness for the state to enter into a written undertaking with security in an amount to be fixed by him, conditioned that they appear at the court to which the accused is committed and give evidence in the case. Code, secs. 4248, 4249. If the witness fail or refuse to enter into the undertaking, as required by the magistrate, he may be committed to jail. Code, sec. 4251. Under this legislation a witness prior to indictment of the accused may be committed to jail upon failure to give security for his appearance to testify in the case upon further proceedings had therein. But under the law, as announced in this case by the majority opinion, a witness, after indictment of the accused, cannot be required to give security for his appearance at the trial upon change of venue. A witness, upon whose testimony the state rests for the conviction of an accused, is by the magistrate committed to jail upon refusal or failure to give bail as ordered. He is held in custody until the court meets, when the accused is indicted and is awarded a change of venue. The witness is then discharged upon his own undertaking without security. The legislature never intended such want of uniformity and wisdom in the statutes. We should so construe them that uniformity and harmony may be attained as far as possible.

V. But it is said that the section of the Code under construction does not by its language require security. That is true, and it is also true that its language does not require any obligation or undertaking to be entered into by witnesses. It is only by interpretation of a word, whereby a meaning is placed upon it which, in fact, it does not have, that the majority opinion reaches the conclusion that the witness may be required to enter

alone into an obligation to appear. I have no difficulty in going a step farther in the interpretation of the word, which may be done under the very same rules which sustain the interpretation of the majority, and holding that the legislature intended that the witnesses should enter into such an obligation with security, if required, which, under the practice of the courts and in harmony with other provisions of the law, is in other like cases required to secure their attendance at the trial after a change of venue has been taken. My conclusions reach a result conducive to the effective enforcement of the laws introduced to punish and suppress crime, and which is in exact harmony with other statutes of like purpose.

In my opinion the judgment of the supreme court ought to be reversed.

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J. B. EYERLY, Appellee, v. THE BOARD OF SUPERVISORS OF JASPER COUNTY *et al.*, Appellants.

Mandamus Against Ex-Officials: ILLEGAL TAXES: RECOVERY. Where taxes in aid of a railroad were levied contrary to law, and collected by the county treasurer, and by him paid to the assignee of such railroad company after the tax had been declared invalid by the decisions of the supreme court, but the taxes so collected were never mingled with the county funds, and no part thereof were in the treasury at the time of the trial herein, the writ of *mandamus* will not lie against such treasurer after the expiration of his term, to compel him to refund the taxes so paid, nor against the present treasurer, who never received any of the moneys thus paid, nor against the board of supervisors, to require them to issue a warrant ordering said ex-treasurer to refund said taxes.

Appeal from Jasper District Court.—HON. J. K. JOHNSON, Judge.

FRIDAY, OCTOBER 17, 1890.

ACTION of *mandamus* to compel the refunding of certain taxes paid by plaintiff and by his assignors to aid in the construction of a railway. There was a trial

by the court, and a judgment in favor of plaintiff. The defendants appeal.

Harrah & Myers, for appellants.

Winslow & Varnum, for appellee.

ROBINSON, J.—This cause has been considered heretofore by this court. 72 Iowa, 149. It was tried by the district court on an agreed statement of facts, from which the following appears:

On the nineteenth day of May, 1881, there was voted a tax of three per cent. on the assessed valuation of the property in Newton township, in Jasper county, to aid in the construction of the New Sharon, Coal Valley & Eastern railroad, the name of which was afterwards changed to the Chicago, Burlington & Pacific. The tax so voted was duly levied, and extended upon the tax books of the county, and placed in the hands of the treasurer for collection. The plaintiff and three others, whose claims are now assigned to him, as he alleges, were property-holders and taxpayers of said township, and paid to the treasurer the taxes in controversy amounting to two hundred and fourteen dollars and seventy-eight cents. In an action to which the assignors of plaintiff were parties plaintiff, it was held that the tax levied as aforesaid was rendered invalid, and non-collectible by a sale and conveyance of the road. *Manning v. Township Trustees*, 66 Iowa, 675. The treasurer of Jasper county was also enjoined from collecting the taxes of any of the parties plaintiff in that action, but under the injunction the treasurer was permitted to receive all taxes offered to be paid by any taxpayer. The treasurer at the time the decree in that case was rendered was one Winchell. He collected from voluntary taxpayers eighty-one hundred and twenty-nine dollars and forty-five cents, most of which he paid to the railroad company, but when he went out of office on the first day of January, 1884, he had in his hands a balance, belonging to the tax fund so collected

of four hundred and sixty-four dollars and two cents, which he paid to his successor in office, S. H. Galusha. In addition to the sum he received from Winchell, Galusha collected from voluntary taxpayers one thousand dollars and eighty-four cents, and paid out of the two sums thus received all but four hundred and sixty-five dollars and three cents to the railroad company. After the *Manning case* was decided by this court, to-wit, on the fifteenth day of April, 1886, he paid out the sum last mentioned to S. C. Cook, and took from him an indemnifying bond. The payment thus made was without any order therefor, excepting that the county auditor, the members of the board of supervisors, and the present defendants verbally advised it. After the decision of this court in the *Manning case*, demand was made of the board of supervisors for an order to refund the taxes in suit, but it was refused. A demand for the taxes was also made on Galusha and refused. Cook claimed the taxes paid by virtue of an alleged assignment thereof. This action seems to have been commenced in July, 1887. The board of supervisors of Jasper county, the members of that board, and S. H. Galusha, treasurer, were made parties defendant. Since this action was commenced Galusha has retired from office. The district court adjudged and ordered that a peremptory writ of *mandamus* issue as prayed, commanding the board of supervisors to issue a warrant "directing S. H. Galusha, treasurer of Jasper county, Iowa, to refund the amount of taxes paid by plaintiff and his assignors, and commanding the defendant, S. H. Galusha, treasurer of Jasper county, Iowa, to pay said warrant, and to refund to the plaintiff the aforesaid sum."

It will be noticed from the foregoing statement that the money in question never became a part of the county fund. So long as it was retained by the county treasurer he seems to have kept it apart, as distinct from other funds. It will also be noticed that the balance of the tax funds in the hands of the treasurer Galusha

was paid out by him to Cook before this action was commenced. He did not, therefore, pay it to his successor in office. That successor is not a party defendant, but the proceedings seem to have been continued against Galusha notwithstanding the fact that his official term is at an end, and judgment was rendered against him, although he was described therein as treasurer. It was said in *Eyerly v. Jasper Co.*, 72 Iowa, 150, that the money in the hands of the treasurer did not belong to the county, nor to the railroad company, but to the taxpayer, and that the action of *mandamus* against the treasurer or supervisor, or both, was the proper remedy for its recovery. That theory was adhered to in the opinion reported in 77 Iowa, 470, but in neither opinion was it said that such an action could be maintained unless the money was in the hands of the treasurer. What was said in the last opinion, as to the liability not depending on whether the money collected had been paid out, referred to cases in which the taxes collected were for governmental purposes. The county is not liable for taxes like these in question, which have never been paid into the county fund, nor used by the county. *Barnes v. County of Marshall*, 56 Iowa, 22; *Butler v. Board of Supervisors*, 46 Iowa, 326; *Merrill v. Marshall Co.*, 74 Iowa, 28. A treasurer who has never received money belonging to a railway aid fund cannot be made liable therefor by *mandamus*. *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 77 Iowa, 535; *Minneapolis & St. L. Ry. Co. v. Becket*, 75 Iowa, 183.

Under the rule of the two cases last cited the present treasurer of Jasper county could not have been made liable in this action, for the reason that he had never received the money in controversy. The question to determine then is, whether it is the duty of the board of supervisors to order him, who, though formerly treasurer, is now a private citizen, to pay to plaintiff money which he once held, but which he had paid out before this action was commenced, and whether such person will be compelled, by order of this court, to make such payment. We are of the opinion that both branches of

the question must be answered in the negative. The board has no power to order a private person to refund a tax. If it be true as claimed, but not determined, that the refunding of such a tax as that in question, by an order of the board of supervisors, is authorized, by section 870 of the Code, it must be true that the order can only be given to the treasurer.

As to the other branch of the question we would say, that, although the petition alleges that there remains in the hands of the treasurer, of the taxes voted and collected for the railway named, more than the amount required to satisfy the claim of plaintiff, the proof shows that the statement is not correct. Neither the present treasurer, nor his predecessor, has the money in his possession. It is shown that Galusha, while treasurer, wrongfully paid out money to which plaintiff is entitled, and that such payment was made before this action was commenced. It thus appears that plaintiff can obtain no relief by *mandamus* which would not be afforded in the ordinary course of the law, and the relief demanded in this action must, therefore, be denied. Code, sec. 3376. Numerous other questions are discussed by counsel, but in view of the conclusions already announced it is unnecessary to determine them.

The judgment of the district court is REVERSED

LAWRENCE & BURD, Appellants, v. JOHN HORNICK *et ux.*, Appellees.

1. **Tax Sale**: DELINQUENT TAXES NOT CARRIED FORWARD: EFFECT. The omission of the county treasurer to carry forward from year to year upon the tax lists the delinquent taxes assessed against certain described real estate, and for which the property is eventually sold, will not render such sale void, but only voidable, and the title based thereon cannot be assailed on that account after five years from the recording of the deed.

2. ———: NOTICE TO REDEEM: OWNERS UNKNOWN. Where real property sold for taxes is not taxed to any person by name upon the tax-books, and the name of the owner during any of the years, for the taxes of which the property is sold, is unknown, no

notice of the expiration of the period of redemption from such sale is required, and the publication of a notice addressed to "unknown owners," which would have been insufficient had the names of the owners been known, will not render the sale invalid.

8. ——: PURCHASE BY TREASURER: EFFECT. The purchase of property at tax sale by the county treasurer renders the sale only voidable, and the same cannot be attacked on that account after five years from the recording of the tax deed.

Appeal from Woodbury District Court.—HON. C. H. LEWIS, Judge.

FRIDAY, OCTOBER 17, 1890.

ACTION to quiet the title to lot nine, block three, Cole's addition to Sioux City. Decree for defendants, from which the plaintiff appeals.

Lawrence & Burd, for appellants.

Hubbard, Spalding & Taylor, for appellee.

GRANGER, J.—The plaintiff is the holder of the patent title. In January, 1877, N. A. McFaul purchased the lot in controversy for the taxes of 1870, '71, '72, '73, '74 and '75, and thereafter assigned the certificate of purchase to E. L. Kirk, who received a treasurer's deed therefor, June 28, 1880, and on the same day the deed was duly recorded. On the twenty-first of April, 1886, E. L. Kirk conveyed the lot to the defendant, John Hornick, by special warranty deed. The appellant assails the validity of the tax title on three grounds, which will be noticed.

I. The first ground of complaint is that the delinquent taxes for prior years, and for which the lot was sold, were not carried forward to the tax lists of other years as required by law. This suit was commenced, December 22, 1887—some seven years after the recording of the tax deed, and the statute of limitations is urged as against appellant's claim to avoid the deed because of such fact. Appellant, however, insists that the

1. TAX sale: delinquent taxes not carried forward: effect.

statute of limitations is unavailable for the reason that the sale is void because of the failure to carry forward the taxes. The controversy then is, whether the sale is only voidable or absolutely void because of such failure. That it is, at least, voidable is not questioned, and, if voidable only, then the action to set it aside must be brought within the five years from the recording of the deed. If void, then there is no basis for the action of the statute of limitations, and the action is not barred. There are some cases in which the terms "void" and "invalid" have been used where the facts and relief sought are the same as in this case, and the reliance of appellant is placed thereon. See *Buckley v. Early*, 72 Iowa, 289; *Hooper v. Sac Co.*, 72 Iowa, 280; *Bank v. Early*, 72 Iowa, 273; *Gardner v. Early*, 69 Iowa, 42, and other cases cited therein. The case of *Griffin v. Bruce*, 73 Iowa, 126, presents and determines the precise question, whether the failure to carry forward the taxes renders the sale void or voidable, and holds to the latter view, and that such "irregularity" "does not operate to arrest the running of the statute." Are the cases in conflict? We say they are not. While the word void is of broader technical significance, it is often used in the sense of voidable. An instance is to be found in *Gardner v. Early*, *supra*, where a deed, because of a failure to carry forward the tax, is said to be "invalid" and "void," but the language immediately following, and other language of the opinion, clearly indicates that nothing more was intended than that it was a voidable instrument. Instances of such use might be multiplied. *Griffin v. Bruce*, *supra*, is clearly decisive of this point in the case.

II. Appellant urges that no sufficient notice of the expiration of redemption was served as provided by Code, section 894. A notice, styled a "blanket notice," was served by publication addressed to "unknown owners" containing a large number of descriptions, but none was served on or addressed to a particular person. The law requires this notice to be served on the "person in

2. ——: notice to redeem: owners unknown.

whose name the land is taxed." If taxed to unknown owner such notice is not required. *Irwin v. Burdick*, 79 Iowa, 69, and cases there cited. The premises in question for the year 1869 were taxed to L. Lambert, but for the years, for the taxes of which they were sold, and thereafter, no owner of the land was indicated by the record; the column for the name of the owner being blank, and, for such years it was not taxed to any person, and there was no one on whom such notice could be served. The record makes no question as to the tax of 1869. The land was not taxed to Lambert for the years in question, and, if not, the law requires no service of notice on him. If no notice was required the mere fact that the blanket notice was insufficient, as claimed, would not invalidate the sale.

III. N. A. McFaul was the ostensible purchaser of the lot at the tax sale, and assigned the certificate to E. L. Kirk. E. L. Kirk is a son of E. R. Kirk who, at the time of the sale, was a deputy treasurer of Woodbury county, where the sale took place; and appellant claims that it appears from the record that McFaul was not the purchaser, but that he acted in bidding in the lot for E. R. Kirk, and in such manner as to render the sale void under the provision of the statute prohibiting treasurers from being concerned directly or indirectly in the purchase of real property sold for taxes. Code, sec. 885. The section provides that "all such sales shall be void." This court also held that such sale was equally void when the prohibited act was done by the deputy treasurer. *Ellis v. Peck*, 45 Iowa, 112. But here, again, the word void is held to mean voidable, and, hence, defendant's plea of the bar of the statute avails him as against this claim of fraud, if the fact of the fraud should be conceded. *Thomas v. Stickles*, 32 Iowa, 71; *Douglas v. Tullock*, 34 Iowa, 262; *Pierce v. Weare*, 41 Iowa, 378; *Bullis v. Marsh*, 56 Iowa, 747; *Griffin v. Bruce*, 73 Iowa, 126.

3. ——: purchase by treasurer: effect.

The judgment of the district court must be AFFIRMED.

N. GODES, Appellant, v. ALMIRA JANE HASSEN Administratrix, Appellee.

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1. **Probate Proceedings**: CLAIMS: DISCHARGE OF ADMINISTRATOR. The discharge of an administrator after the statutory period for the filing of claims, while a claim of the third class, duly verified and filed, remains unsettled, nor in any manner acted upon by the administrator, nor by the court, though not admitted nor proved, without notice to the claimant of the application for discharge, is invalid, and may be set aside on petition by such claimant therefor.

2. ——: ——: ——. In such case it is not necessary for the claimant to show that the estate was solvent, nor that the administrator had assets with which to pay his claim. Prejudice will be presumed.

Appeal from Jackson District Court.—HON. C. M. WATERMAN, Judge.

FRIDAY, OCTOBER 17, 1890.

APPLICATION to have set aside an order discharging the administratrix of an estate, and for leave to prove a claim against the estate. A demurrer to the petition was sustained, and judgment rendered in favor of the defendant for costs. The plaintiff appeals.

D. A. Wynkoop, for appellant.

Keck & House, for appellee.

ROBINSON—The material facts shown by the petition are substantially as follows: On the first day of February, 1886, one L. D. Smith made and delivered to plaintiff his promissory note for three hundred and forty-three dollars and nineteen cents, due in one year, with interest thereon at eight per cent. per annum from date. On the first day of February, 1887, Smith having died, Almira Jane Hassen was duly appointed administratrix of his estate. On the fifth day of April, 1887, the note being wholly unpaid, plaintiff duly filed a verified copy

of his claim with the clerk of the proper court. He was directed to so file it by the attorney for defendant, but never gave formal notice thereof to defendant, and took no further steps to collect it until after July, 1888. The defendant entered upon the discharge of her duties as administratrix, but procured an order in July, 1888, discharging her as upon the final settlement of the estate, but without paying or allowing the claim of plaintiff, although she had personal knowledge of it. She gave plaintiff no notice of her application for a discharge, and he had no knowledge of it until the order of discharge had been made. She withheld from the court all knowledge of the claim, and no order in regard to it was ever made.

I. Section 2408 of the Code provides for the filing of claims against an estate, and for notice to the executor of the hearing thereof, unless it has been approved by him. Section 2410 provides that all claims filed, and not expressly admitted in writing, signed by the executor, with the approbation of the court, shall be considered as denied without any pleading on behalf of the estate. It is admitted that the claim in this case was properly entitled and filed, and it was filed in time to constitute a claim of the third class. It was, therefore, a just claim, but not having been admitted, as provided by statute, was in law denied, but was a pending claim against the estate awaiting proper action when the order of discharge was made. There was nothing whatever to indicate that it had been abandoned by plaintiff, and neither the defendant nor the court was justified in so concluding. The statute provides for notice of the hearing of a claim, but does not fix the time within which it shall be given, even inferentially, as to claims of the third class. Section 2421 does not apply to claims of that class. *Smith v. McFadden*, 56 Iowa, 482. So long as a claim of the third class, duly verified and filed, is not acted upon by the executor, nor by the court, and is not abandoned, it cannot be considered settled, and administration cannot properly be closed.

1. PROBATE proceedings: claims: discharge of administrator.

The facts admitted by the demurrer show that, when the order of discharge was made, plaintiff was the holder of a valid claim against the estate which was unsettled and pending, and that he was interested in the estate, in its administration, and in the discharge of the administrator. Rule 7 adopted by the convention of district judges to govern the practice in probate is as follows: "Unless notice be waived in writing, no administrator, executor, guardian or trustee will be discharged from further duty or responsibilty, nor upon final settlement, until notice of the application shall have been given to all persons interested, as required in case of an original notice for the commencement of a civil action, unless a different notice be prescribed by the court." It is clear that plaintiff was interested within the meaning of that rule, and that he was entitled to the notice therein required. There is nothing in the record from which a waiver of notice may be inferred, and it does not appear that a different notice was prescribed by the court. The record shows that no notice whatever was given, and, notice not having been waived, the court did not have authority to discharge the defendant, and the action taken to that end should be set aside. *Van Aken v. Coldren*, 80 Iowa, 114.

II. It is said that it does not appear that appellant was prejudiced by the order of discharge, for that it is not shown that the estate was solvent, nor that the defendant at any time had any assets from which the claim of appellant could have been paid. Prejudice will be presumed from the facts stated. It was not necessary for plaintiff to show affirmatively that the estate was solvent or had means with which to pay his claim. He was entitled to a hearing of his claim, and, in the absence of a showing to the contrary, that right will be presumed to be a valuable one.

2. THE same.

What we have said disposes of all material questions in the case. For the reasons indicated, the judgment of the district court is REVERSED.

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A. J. HIRSCHL *et al.*, Appellees, v. J. H. CLARK, Trustee, Appellant.

Mutual Benefit Insurance: ASSIGNMENT. Where a contract for insurance in a mutual benefit association authorizes a change in the beneficiary upon the direction of the insured, and neither the consent of the association nor the surrender of the benefit certificate is required either by the contract for insurance or by the constitution or by-laws of the association, a written instrument duly executed by the insured, and forwarded, at his instance, to the association by mail, reciting that he thereby surrenders the benefit certificate theretofore issued to him, and directing that a new certificate be issued to him, payable to a different beneficiary, will be effectual to change the beneficiary under said certificate, and will be binding upon the association after notice thereof, without the surrender of the certificate in fact, although it was the practice in the business of said association to require the surrender of benefit certificates in such cases before issuing new ones, and the association had neither issued a new certificate as directed, nor assented to the change of beneficiaries, before the death of the assured. (*Distinguishing Stephenson v. Stephenson*, 64 Iowa, 534.)

Appeal from Scott District Court.—HON. ANDREW HOWAT, Judge.

MONDAY, OCTOBER 20, 1890.

THIS is an equitable proceeding, the object of which is to determine the rights of the parties to the proceeds of a benefit certificate, issued by the Iowa Knights of Pythias Insurance Association upon the life of William Burrows, deceased. The plaintiff claims the said proceeds as trustee for the mother and other relatives of the deceased, and the defendant, Mary Burrows, claims that she is the lawful beneficiary of the fund, and that it should be paid to her. The insurance association made no contest as to the validity of the certificate, and, by agreement of all parties, the money due from the

association was paid to A. J. Hirschl, Esq., and by proper pleadings Clark, the trustee, and said Mary Burrows presented their respective claims to said proceeds. The district court held that Mary Burrows was the lawful beneficiary, and ordered the proceeds to be paid to her. J. H. Clark, trustee, appeals.

C. W. Haller and *G. H. Koch*, for appellant.

Bills & Haas, for appellees.

ROTHROCK, C. J.—I. The insurance was effected in October, 1882. The contract of insurance was made upon an application, of which the following is a copy:

"I, the undersigned, desire to become a member of the Iowa Knights of Pythias Insurance Association, and hereby certify that I will true answers make to all questions, and, to the best of my knowledge and belief, will not conceal or omit to state anything regarding my health, past or present, affecting the expectancy of my life, and agree that any untrue or fraudulent statements made in this application, or to the medical examiner, or any concealment of facts by me made, or my suspension from my lodge, or voluntarily severing my connection with this association, shall forfeit all right, claim and interest, and all right, claim and interest of my heirs, executors, administrators and assigns, in and to all benefits and privileges of the association. I direct that all benefit to which I may be entitled from the association be paid to Mary Burrows, related to me as wife, subject to such future disposal of the benefits as I may hereafter direct.

"[Signed.] WILLIAM BURROWS,
"[Signature of applicant.]"

The benefit certificate issued by the association was in these words:

"No. 142. Duplicate. $2,000. Iowa Knights of Pythias Insurance Association. Benefit Certificate. This certifies that Knight William Burrows is a member

of the Iowa Knights of Pythias Insurance Association, located at Marshalltown, Iowa, and upon condition that the statements made by him in his application for membership in said association, and the statements certified by him to the medical examiner, were true at the time of making thereof, and that they be made a part of this contract, and upon the further condition that the said member complies in the future with the laws, rules and regulations now enacted, or which may hereafter be enacted, to govern said association, then the said Iowa Knights of Pythias Insurance Association hereby promises and binds itself to pay out of the funds of said association to Mary Burrows [wife] a sum not exceeding two thousand dollars, in accordance with, and under the provisions of, the law governing said association, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate: provided that said member is in good standing in said association at time of death. In witness whereof, the Iowa Knights of Pythias Insurance Association has hereunto affixed its seal, and caused this certificate to be signed by its president, and attested and recorded by its secretary at Marshalltown, Iowa, this seventh day of October, A. D. 1882.

"(Signed.) BYRON A. BEESON,
"E. H. HIBBEN, President.
"[Seal.] Secretary."

William Burrows died at the city of Davenport, in this state, on the twenty-sixth day of April, 1888. On the twenty-first day of said month, he executed an instrument in writing, in these words:

"I hereby surrender the benefit certificate issued to me, William Burrows, by the Iowa Knights of Pythias Insurance Association, and direct a new one to be issued to me, payable five hundred dollars ($500) to Elizabeth Burrows, related to me as mother, and five hundred dollars ($500) to my sister, Mrs. Gill, the balance to pay my legal debts; and the balance to John Sandry, wife, two children and nephew, Frank McCoon, share

and share alike. All in trust to Joseph H. Clark to be carried out as directed.

"Witness my hand and seal, April 21, 1888.

"[Signed.] WILLIAM BURROWS.

"Signed by WILLIAM BURROWS in presence of

"D. C. GARRETT,

"C. O. ANDERSON,

"E. L. RAFF."

There is no controversy about the execution of this paper, and, although it appears that Burrows was quite feeble at the time he signed the same, there is no evidence that it was not his voluntary act, or that those who were present and prepared the paper, and witnessed the signature, used any influence or persuasion to induce him to sign it. They were present at his request for the purpose of aiding him in carrying out his desire to change the beneficiary in the certificate. One of said persons testified as a witness as follows: "I got home that morning from a three weeks' absence. Mr. Burrows sent for me, and said he wanted to change his policy to his mother and sisters, and wanted to know whether or not I could do anything for him. He said he had one policy he expected to leave to his wife, and the other policy he would rather have changed. He said his mother and sisters were as much entitled to it as his wife on account of the treatment he had had lately. He said he was afraid to stay in the house after the policy was changed. I said I did not know much about it, but would go and see Clark. I went to Clark, and we went to Heinz & Hirschl to see about having the policy changed." Another testified as follows: "I was summoned to the sick bed of William Burrows, and he urged me to assist in making this change; that he had long intended to make the change, but his wife had prevented him from doing it, and he wanted me to help him with it, which I promised I would do, and, when the paper was brought, there were some minor changes to be made."

It further appears in evidence that the said paper was placed in the mail at Davenport, on the evening of the twenty-third day of April, 1889, inclosed in an

envelope, addressed to the said insurance association at Marshalltown. This is not absolutely certain; but it was mailed at some time between the day of its date and April 26. We think the preponderance of the evidence shows that it was mailed on the twenty-third, and that it was sent in the mail on the evening of that day. And it appears from the evidence, that a letter mailed at Davenport in time for the evening mail will, in due course of transmission, reach Marshalltown at about ten o'clock the next morning. This conclusion is not inconsistent with the testimony of the president and secretary of the association. They testified that the paper was not received until the twenty-seventh; but they both state that for some time previous to that date they had both been absent. They do not state that the mail addressed to the association was taken from the post-office on the twenty-fourth, twenty-fifth and twenty-sixth of that month. A letter was inclosed with the paper, of which the following is a copy:

"HEINZ & HIRSCHL,

"April 23, 1888, 202 West Second Street,
" DAVENPORT, IOWA.

"*E. H. Hibben, Esq., Marshalltown, Iowa.*

"DEAR SIR:—We inclose assignment, pertaining to transfer of benefit certificate issued to Wm. Burrows, and affidavit in relation thereto. We inclose one dollar ($1), fifty cents being intended for the transfer. You can return the change in postage stamps. Please make the change at once, transfer at once, and advise us accordingly. Yours respectfully."

At the time the instrument by which it was sought to change the beneficiary was signed by said Burrows, his wife was in possession of the certificate, and was requested to surrender it. This she refused to do in the most positive terms, saying that she would burn it up and destroy it rather than deliver it up, and that she would see Clark, the trustee, "in hell, before she would give him the paper." Immediately after the transaction was completed, the persons who assisted Burrows

in making the transfer removed him to Mercy Hospital, in Davenport, where he remained until he died. It does not appear that deceased left any children surviving him. At the same time that the paper in question came into the hands of the officers of the association at Marshalltown, they also received a notice of the death of Burrows, and no action was taken by the association in regard to a change of the beneficiary. The printed articles of incorporation and laws of the association contained the following, among other provisions: "The association shall furnish each member thereof with a benefit certificate, signed by the president, and duly attested by the secretary, and said certificate shall contain the agreements on the part of the association and member. The fee for changing a benefit certificate shall be fifty (50) cents. They (the board of directors) shall have power to make such rules and regulations for their government, *i. e.*, payment of claims, reception of proof of death, and transaction of general business, as a majority may see fit, not conflicting with these laws." The benefit certificate was a printed form in blank, and on the back of it was printed these words: "I do hereby surrender the within benefit certificate, and direct that a new one be issued to me, payable to —— ——, related to me as —— ——."

II. The foregoing is a statement of the facts necessary to be considered in determining which of the claimants is entitled to the fund in the hands of the trustee. It will be observed that, by the very terms of the benefit certificate, the application is made part of the contract between the insurer and the insured. The obligation of the association was to pay the amount due to the wife of Burrows, subject to such future disposal of the benefits as he might thereafter direct. If the contract contained no other requirement, we think that it is quite plain that this direction to make payment to some one other than Mary Burrows might be made by assignment, or by any direction in writing which would protect the association in making payment of the loss to the person designated by the insured. It is insisted,

however, that, as the certificate requires that it shall be surrendered to the association before payment, and that the member bound himself to comply with the laws, rules and regulations then enacted, or thereafter to be enacted, governing said association, that no transfer was made, because the certificate was not surrendered, and the laws, rules and regulations of the society have not been complied with.

The requirement that the certificate should be surrendered upon payment of the loss must receive a reasonable construction. Suppose it should appear upon the death of a member that the certificate had been lost or destroyed. No one would claim that the insurer could escape payment by reason of the failure to surrender the certificate. And it is to be observed that there is no requirement in the contract that the certificate shall be surrendered in order to effect a change of the beneficiary. It does not even provide that it is necessary to notify the association of the change at the time it is made. By the very terms of the contract, the change of the beneficiary is a mere direction to the association, which it is bound to obey. The "disposal of the benefits" may be made by the mere direction of the insured. This act does not require the assent of the association. It is not a new contract between the insurer and the insured. If the association receives notice of the change in the beneficiary before it has been in any way prejudiced, it would seem that it would be bound to obey the direction. These views appear to us to be founded on sound reason,

We look in vain for any rule or regulation enacted by the association with which Burrows failed to comply. It is true that the blank on the back of the certificate indicates that the manner of conducting the business of the association was to surrender the first certificate, and issue another to the new beneficiary, and the evidence shows that this was the practice of the company. But this was a mere regulation for the convenience of the company, of which its

members had no notice. It was no part of the constitution or by-laws of the association; and rules or regulations adopted by the officers of the company, in regard to the transaction of business, and which do not enter into the constitution of the company as provisions of its charter or by-laws, are not embraced in the certificate. They are such rules as fix the rights of members of the company, and are parts of the laws of the institution which are to be regarded as parts of the contract. *Walsh v. Ætna Life Ins. Co.*, 30 Iowa, 133, and authorities there cited. The case of *Stephenson v. Stephenson*, 64 Iowa, 534, is in no sense in conflict with the views we have expressed. In that case the by-laws, which were made part of the contract, made specific provision as to the manner of changing the beneficiary. It is there said that "the manner in which this should be done formed a part of the contract of insurance."

We have set out the facts attending the execution of the paper by Burrows, and the time of its reaching the association, with more particularity than may have been necessary. In our opinion, the fact that Burrows died before the association received the instrument is not a material question. Under this contract Burrows could have changed the beneficiary by an assignment on the certificate, or by a separate paper, and it was complete, at least so far as Mary Burrows was concerned, when it was delivered to Clark, the trustee. Notice to the insurer of the assignment was not necessary, unless required by the contract of insurance. Bliss on Life Insurance, sec. 333; May on Insurance, secs. 388, 396, and authorities cited. Where a policy is assignable, or where a benefit certificate authorizes a change of beneficiaries, which is the same thing in effect as an assignment, notice of the assignment is not necessary to its validity, unless required by the contract of insurance. The execution of the instrument by Burrows, directing that the money be paid to his mother and brothers and sisters, operated as an equitable assignment. The consent of Mary Burrows was not necessary to effect the object. And she could not defeat

it by refusing to deliver the certificate when it was demanded. She had no vested right in the paper, nor in the insurance. If it had been procured from her by fraud, and a new certificate issued to another beneficiary, she would have had no right to complain. *Brown v. Grand Lodge*, 80 Iowa, 287. The decree of the district court will be REVERSED

FIRST NATIONAL BANK OF GRUNDY CENTER, Appellee, v. THOMAS BROWN, Sheriff, Appellant.

Practice: COSTS: PAYMENT. The district court made an order in vacation granting the plaintiff a new trial upon condition, that it pay the costs in the case by noon of the next day after service of notice of said order, if served in term time. The notice was so served and before noon of the next day, the amount of the costs having been ascertained, plaintiff's counsel requested the clerk to consider the costs paid, and he would see his client, and have him give him the money. To this the clerk assented, and entered his receipt for the money of record. The money not having in fact been paid, however, the defendant more than a month afterwards filed a motion for judgment on the above order of court. *Held*, that plaintiff had sufficiently complied with the order to entitle it to the new trial.

Appeal from Grundy District Court.—HON. C. F. COUCH, Judge.

MONDAY, OCTOBER 20, 1890.

ACTION in replevin. The jury returned its verdict for defendant on the fourth day of June, 1888, and on the seventh day of June the plaintiff filed its motion for a new trial, which, was by agreement, submitted to the judge in vacation, who in vacation prepared an order of which the following is the material part for the purpose of this appeal:

"The following order is made by consent of parties in vacation, upon condition that the plaintiff pay all costs of the trial had in this case. The plaintiff is granted a new trial, provided, however, that if the plaintiff fails

to pay said costs by noon of the second day of the term succeeding the service of notice of this order, or by noon of the next day after such service if made in term time, then the defendant will have judgment for the return of the property or its value, to-wit, one hundred and seventy-five dollars, on the verdict in this case, and the motion for a new trial will stand overruled."

This order was filed in open court on the tenth day of April, 1889, and under the conditions of the order, to entitle plaintiff to a new trial, the costs must be paid by noon of the eleventh day of April, 1889. On the twenty-eighth of May following, the defendant filed a motion for judgment on the order of the court, because the costs had not been paid as required by the order. The court overruled the motion, and from its order the defendant appealed.

J. J. Tolerton, for appellant,

R. J. Williamson and *Boies, Husted & Boies*, for appellee.

GRANGER, J.—The motion for judgment, which is the basis for the order of the court appealed from, presented the question, whether or not the plaintiff had so complied with the order for payment of costs as to be entitled to a new trial. Affidavits were filed by the parties for and against the claim that they had not been paid. The amount of the costs to be paid was thirty-nine dollars and ten cents, and in the clerk's office is his (the clerk's) receipt for that amount, dated April 11, 1889. It is, however, a fact, that the money was not at that time, nor for sometime thereafter, actually paid to the clerk; and, as much in the affidavits is directed to this particular point, we need not incumber the opinion with their production. At the request of the court the clerk prepared and filed the following affidavit to be considered in disposing of the motion:

"I, E. H. Allison, clerk of the district court of Iowa, in and for Grundy county, do state that the following are the facts, as to the costs ordered paid in the

above-entitled case as per decision of Judge NEY filed at our April term, 1889. I was asked by Mr. Williamson in the court room to figure up the amount of costs as per order of ccurt, and we agreed to go to the office in the evening and do so, April 10, 1889, and did so; but as I did not have the decision with me I was not positive as to which costs, and I deferred filling in the amount in the receipt till next morning, when I was to look more particularly over it, which I did and informed Mr. Williamson of the same at the court room, or on the street near, and he said for me to consider it paid, and he would see Shuler, and have it fixed, and have him give me the money or deposit it for me, and I think I gave him to understand that would do. I also informed Mr. Shuler of the amount. And the day I was making up my record in the case Mr. Brown, sheriff, came in followed soon after by J. M. Rea, and the sheriff spoke something about his costs, and I said I had not got the money yet, and that I must go and see the parties about it, and I did speak to Mr. Williamson about it."

Nothing more is claimed by appellant than that the money for the costs was not actually paid to the clerk before the filing of his motion for judgment, and such fact must be found in his favor. We then meet the question if such actual payment is absolutely essential to a compliance with the order. It is true that such an arrangement had been made that the clerk had entered in the records of the court his receipt for the money. Just what the understanding was between the plaintiff and the clerk is somewhat in dispute, but the evidence is such, that the district court may have found that the plaintiff had made such an arrangement that the costs would have been paid at any time to any party entitled thereto on demand. No demand for costs was at any time made, nor were they in any manner called for. There were inquiries if the money had been "actually received," but such inquiries seem to have been for other purposes than to obtain the money. Now, as a test of the actual necessity for the payment of the

money by plaintiff, let us suppose that the costs had been called for by defendant, and in pursuance of the arrangement with the plaintiff the clerk had paid them, or offered the money, and it had been refused merely because not paid in by the plaintiff. Would it then be thought that a motion for judgment should be sustained because of the default on the part of the plaintiff? Evidently not, and for the reason that there was a substantial compliance with the order of the court. The court intended by its order that the defendant, or parties entitled thereto, should have the costs at any time after a particular date. If such provision was made that they could have them, who can rightfully complain? Now there is much in the record to show that the clerk expected to pay these costs if called for. It is in harmony with the facts that he had receipted for them on the record, and his statement to the defendant that his receipt made him personally liable for them. We are not intimating that this arrangement would be a compliance with the order, if the money was not ready when called for at all times after the period fixed. If it was ready, we think it would be a compliance. It is not necessary for us to say that the testimony shows such fact. It is only necessary for us to know that the district court could have so found from the testimony, and of that fact there is little room for doubt. We do not try the question of fact anew. It is a proceeding at law, and all presumptions are in favor of the findings of the court.

We have not set out all the testimony from which the district court could have found the fact as to the costs being provided for, nor is it necessary. It is not the doubtful question in this case. It was the judgment of the district court that the plaintiff should have a new trial upon the conditions named; and it seems also to be its judgment that the plaintiff has so complied with the conditions that the trial should not now be denied. We are unable to discover any prejudice to the defendant in the rulings, and the action of the district court in refusing the motion for judgment is AFFIRMED.

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J. W. JAMISON, Appellee, v. F. D. WEAVER, Appellant.

1. **Attorney and Client:** NEGLIGENCE: DAMAGES. The employment of an attorney to appeal and prepare a case for trial, to prepare an abstract and do all things necessary to present said cause to the supreme court, includes all that an attorney can do in the direction of the appeal, and to prosecute the same to a final decision in that court; and if, without requesting money of the client for prosecuting the appeal, he fail to do anything in the cause further than prepare and serve a notice of appeal, and direct his client to procure a bond, and the cause is affirmed in the supreme court on motion of the appellee therein, and judgment is rendered against the client for costs, because of the negligence of the attorney to prosecute said appeal, and he deceives his client by representations that he knows what to do, and is attending to said appeal, the attorney will be liable in damages to the client for the amount of the judgment rendered against him, with interest.

2. ——— : EVIDENCE: OPINIONS. An inquiry whether specified services sued upon were rendered by an attorney in pursuance of a particular contract calls for a fact and not an opinion, and is one that may be answered by the client.

3. **Attachment:** DAMAGES: EVIDENCE. In an action for the wrongful suing out of an attachment levied upon a stock of merchandise, which was thereupon removed from the storeroom where it had been kept, evidence of the value of the stock, and that a portion thereof was of a perishable nature, and of the extent to which the same was damaged, is competent.

Appeal from Jones District Court.—HON. J. H. PRESTON, Judge.

MONDAY, OCTOBER 20, 1890.

ACTION upon an account for services rendered by plaintiff as attorney for defendant, aided by an attachment sued out upon the grounds, that defendant was about to remove permanently out of the county, and had property therein not exempt from execution, and that he refused to pay or secure the debt, and he was about to remove his property out of the state without leaving sufficient remaining to pay his debt. The

defendant answered, admitting that plaintiff rendered the services sued for, but denying that they were of the value charged, averring the payment of forty dollars, and that the services were performed under a verbal contract at prices named, less than those charged. The defendant filed his counterclaim in three counts; the first being for four dollars and sixty-five cents for various articles furnished to plaintiff; the second was for damages by reason of plaintiff's failure to properly prosecute an appeal in the supreme court, and the third for damages for wrongfully suing out the attachment. Plaintiff's demurrer to the second count was sustained, to which defendant excepted, and, refusing to plead further, assigns the sustaining of said demurrer as error. Plaintiff replied to the other counts of the counterclaim, admitting the first count for four dollars and sixty-five cents, and denying every other allegation of the counterclaim, and that the services sued for were rendered under a special contract. The case being tried to a jury, a verdict was returned in favor of the plaintiff for eighty-seven dollars and eighty-five cents, and, defendant's motion for new trial being overruled, judgment was entered upon the verdict, from which the defendant appeals.

Remley & Ercanbrack, for appellant.

Keeler & Ellison, for appellee.

GIVEN, J.--I. The count demurred to alleges that plaintiff agreed, as attorney for defendant, to appeal and prepare for trial in the supreme court a certain injunction case entitled State of Iowa *v.* this defendant, to prepare an abstract of the record and evidence, and to do all thereunder necessary to present said cause to the supreme court; that plaintiff, knowing that defendant did not understand what was necessary to do in the matter, represented to him that he knew what was necessary to do; that plaintiff prepared and served a notice appeal, and that defendant

1. ATTORNEY and client: negligence: damages.

had procured bondsmen on the appeal bond; that defendant followed plaintiff's direction in all things, and was ever ready to furnish such money, and to do anything that the plaintiff should deem necessary; that plaintiff did not request him to furnish any money, and said that he was prosecuting said appeal; that plaintiff did not request defendant to furnish any money or do anything therein; that in fact the plaintiff negligently failed to prepare an abstract and argument in said case, and failed to file a transcript, or any other paper, in the supreme court, and negligently and carelessly permitted said cause to be docketed in said court by the appellee therein, and that the same was affirmed by said court on motion of the appellee, and all of the costs occasioned by said appeal taxed to this defendant, amounting to thirty-seven dollars; that, because said appeal was not presented by this plaintiff to said court, said costs were taxed to this defendant; that plaintiff stated to this defendant that he was prosecuting said appeal, when in fact he had not done anything therein, and did not do anything in said matter; that, by reason of said negligence and misrepresentations of plaintiff, this defendant was compelled to pay, and paid, said judgment for costs rendered against him, wherefore he claims of plaintiff said sum of thirty-seven dollars with interest.

The grounds of the demurrer are, that the second count of the counterclaim does not show that the defendant paid or furnished the necessary expenses for conducting the appeal, nor that the plaintiff engaged to carry the appeal further than he did, nor that he disobeyed any instructions of the defendant, nor failed to render all the services for which he was employed; that it does not show that the plaintiff made any misrepresentations of facts, that the defendant relied upon to his prejudice, nor that the defendant has sustained damages as a direct result of the breach of contract alleged. The allegation is that the plaintiff agreed, as attorney for defendant, to appeal and prepare the case for trial, to prepare an abstract, and do all things necessary to present said case to the supreme court. Such an employment

includes all that an attorney could do in the direction of the appeal; it shows an engagement to prosecute the appeal, as attorney for the appellant, to final decision. The serving of a notice of appeal and directing the giving of bond was not a fulfillment of the employment alleged. The defendant might have directed a dismissal of his appeal but no instructions or directions were necessary from him to a prosecution thereof. It is alleged that plaintiff represented that he knew what was necessary to do in prosecuting the appeal, and that he represented that he was prosecuting it when in fact he was not doing so. The obvious meaning and sense of the count is that plaintiff relied upon those representations, and, hence, did not know of or take steps to prevent the affirmance upon the motion of the appellee in that case. Those were representations upon which the defendant might rely, and upon which it fairly appears that he did rely, and the result was that judgment for the costs of the appeal, including the twenty-five dollars attorney's fees, was entered against and paid by him.

It is contended, that as the count fails to show that the defendant paid or furnished the necessary expenses of conducting the appeal, there was no obligation upon the plaintiff to proceed further with it. It requires no argument to show that, under his employment, the plaintiff was under no obligation to pay any of the expenses necessary to the prosecution of the appeal, nor to become personally liable therefor. It was the duty of the defendant to provide for all such expenses, and a failure on his part to do so, after being properly advised by his attorney, would excuse the attorney from further prosecuting the appeal. It is alleged that the plaintiff knew that defendant did not understand what was necessary to do in the matter of the appeal, that defendant followed plaintiff's directions in all things, and was ever ready to furnish money and to do anything that the plaintiff should deem necessary, and that the plaintiff did not request him to furnish any money. Attorneys are presumed to be familiar with the law and rules of practice, and to know when, and for what expenses, it is

necessary to provide in the prosecution of an appeal, while ordinarily clients are uninformed in these matters, and rely upon the advice and direction of their attorneys. It is also clearly a part of the plaintiff's duty under the alleged employment to advise his client when and for what expenses it was necessary for him to provide in the prosecution of the appeal. If after being so advised the client failed to provide for such expenses, that would excuse the attorney from proceeding further, but this second count negatives any such state of facts. It shows that plaintiff neglected to inform his client when to furnish money to pay the necessary expenses of the appeal.

The damages claimed were clearly the direct result of the failure to prosecute the appeal. We fail to discern any cause that came between the failure to prosecute the appeal, and the judgment which defendant was compelled to pay. The failure was not only a direct, but the only, cause for the judgment. True, the defendant might have been charged with all these costs other than the attorney fee, had the appeal been prosecuted, but that would have been a different judgment, and for a different cause, and does not change the fact that this judgment was the direct consequence of the alleged failure of the plaintiff to prosecute the appeal. The count demurred to, fairly construed, shows a cause of action against the plaintiff, and the objection taken by the demurrer, and the arguments adduced in support thereof are too technical to be sustained.

II. There was an issue as to whether the services sued for by plaintiff were rendered under special contract or not. There was testimony tending to show that plaintiff had rendered other services that were not claimed to be under the contract. We think the court should have permitted the defendant to answer whether the services sued for were under the contract or not. The question called for a fact and not an opinion.

2. ——: evidence: opinions.

III. The defendant claimed that the attached goods were damaged in the removal and return to the

3. ATTACHMENT: damages: evidence.

store where kept, and for being deprived of them while under the attachment. The defendant should have been permitted to prove the value of the stock of goods as tending to show the damage by removal and detention, for the removal and detention of a stock of goods worth several thousand dollars would be different from the removal and detention of a stock of much less value. The defendant should have been permitted to prove that any part of the goods attached were of a perishable nature and the extent to which they were damaged by reason thereof, while detained under the attachment. Such damages as well as the damage resulting from proper handling in removing and returning the goods would be directly caused by the suing out of the attachment.

IV. There was no error in refusing to allow the defendant to prove that his creditors had returned to him printed slips stating that he had been attached and that notices had been sent to the commercial papers. It is contended that this evidence was admissible as tending to show malice in the suing out of the attachment, and that defendant was attempting to trace the sending out of such notice to the plaintiff. Without being so traced the testimony was clearly inadmissible and it was within the discretion of the court to require the defendant first to produce evidence tending to connect the plaintiff with the sending out of the notices before introducing the printed slips to the jury.

V. It is complained that the court in the fifth paragraph of the instructions ignored the plea that the services were rendered under special contract. Taken alone that paragraph is open to this objection but, taken in connection with the following paragraph, the subject is fully and fairly presented to the jury. We see no error in the instructions.

For reasons already stated the judgment of the district court must be reversed. As the other errors assigned will not arise on a retrial they need not be noticed. REVERSED.

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G. L. SMITH, Appellant, v. J. R. GORRELL *et al.*, Appellees, AND JASPER COUNTY, Appellant.

1. **Adverse Possession: DECREE: WAIVER OF APPEAL.** Acts of a party pending litigation in recognition of rights subsequently determined by a decree of court therein, but previously abandoned, will not operate as a waiver of the right of appeal from such decree.

2. ———. The failure of the public to assert any right to a strip of land over which a public highway had been established for nearly thirty years, and the continued and adverse use and occupation of the same by the plaintiff and his grantors, in good faith, for nearly that length of time, *held*, sufficient to vest a title to such land in the plaintiff by prescription, although the person originally taking possession thereof had knowledge of a road having been established thereon.

Appeal from Jasper District Court.—HON. D. RYAN, Judge.

MONDAY, OCTOBER 20, 1890.

ACTION to enjoin the opening of an alleged public highway. The county of Jasper was made a party defendant by order of the court. On final hearing a decree was rendered, from which plaintiff and the county of Jasper appeal. The facts are stated in the opinion.

Meredith & Ogg, *Alanson Clark* and *W. G. Clements*, for appellants.

Winslow & Varnum, for appellees.

ROBINSON, J.—This action was commenced April 23, 1888. The plaintiff is the owner of the southeast quarter of the southeast quarter of section twenty-four, township eighty, range twenty, in Jasper county. The defendant Groebel is supervisor of the road district in which the land is situated, and threatens to enter upon

the same, and open a public road along the south line thereof. The defendant Gorrell is the owner of property in the neighborhood, and is desirious of having the road opened. Groebel and Gorrell are the appellees, and they contend that a state road was duly established on the line in question in the year 1858 by virtue of chapter 91 of the Acts of the Sixth General Assembly, and chapter 149 of the Acts of the Seventh General Assembly. Reliance is also placed upon some provisions of the Code of 1851. The plaintiff denies that the road was ever in fact established, and claims, further, that his title is now perfect to the strip of land in dispute as against the public by reason of adverse possession under claim of absolute ownership by himself and his grantor for more than ten years.

The district court found in favor of Gorrell, and, as to him, dismissed the petition. It further found that plaintiff was the absolute and unqualified owner of the land described excepting a strip thirty feet wide on the south side thereof. It further found that the highway in question was established in December, 1858, along the south side of said forty-acre tract, and that it included the strip described. The court also found that notice of the establishment of said road and of the right to claim damages by reason thereof had never been given to the owner of the land, excepting as it was imported by the passage of the acts specified, and the filing of the commissioner's report with the county judge, and that the question of damages had never been determined. It was also found that the strip had been inclosed with the remainder of the forty-acre tract for more than fifteen years continuously prior to the commencement of this action, under a claim adverse to the public; that the agent of the owner who first inclosed the tract had actual knowledge of the location of the road in question; that no work had been done by the public on the strip described, and no travel had passed over it for more than fifteen years prior to the commencement of this suit; that Groebel, as road supervisor, was about to enter upon the strip for the purpose

of opening the road when enjoined, and that the county of Jasper was liable to plaintiff for the damages which would result from taking the strip of land for public use. After the county was made a party defendant, it was ordered to proceed by its officers without delay to have determined the question of damages, when claims therefor should be made, and the cause was continued for further order upon the matter of the assessment of damages.

I. Appellees have filed a motion to dismiss the appeal, and to strike evidence from the abstract. It is claimed that plaintiff is not entitled to further prosecute his appeal for the reason that he has recognized the decree from which he appeals by filing a claim for damages, and joining in an application for the vacation of the road. It appears that plaintiff did file a conditional claim for damages, addressed to the board of supervisors of Jasper county, but that it was filed before the final decree was rendered by the district court, and had been abandoned when that decree was rendered. It also appears that he never joined in the application for the vacation of the road.

1. ADVERSE possession: decree: waiver of appeal.

The motion to dismiss is in part based upon the alleged ground that the evidence offered, and the evidence introduced, on the trial in the district court was not so preserved and certified that the cause can be tried here *de novo*. It is not necessary to specify the questions presented by the motion, since all of them fall within the decisions of this court heretofore announced in the form of opinions. It is sufficient to say that it is made to appear by numerous papers filed that the evidence in question was duly preserved, and made a part of the record in the manner and within the time required by law. The motion to dismiss and to strike is overruled.

II. In the view we take of the case it is not necessary to decide the numerous questions which are discussed by counsel, and which relate to, and grow out of, the alleged establishment

2. —.

of the road in question. It very clearly appears that so far as it was upon or adjacent to the land of plaintiff hereinbefore described, it was never opened, worked nor traveled. The land on that portion of the line was broken, covered with brush and timber, and was not practicable for teams without some clearing and grading, and perhaps bridging. There was but little travel in that vicinity and what there was passed along by paths and wood roads without regard to lines or points of compass. The land was first fenced in the year 1866, by one Kilgore for his mother. At that time he had heard neighborhood talk to the effect that the road had been located, but as the road was not open on either side of the land he paid no attention to it. His mother conveyed the land to one Thrift in the year 1873. In June, 1877, one Thompson acquired title to the land by virtue of a warranty deed, and plaintiff claims through him by a succession of warranty deeds. It is shown that Thompson and all the grantees in the chain of title from him took, held and used the land, without any actual knowledge of the existence of the alleged road, and that their possession was actual, continuous, open, notorious and adverse to all other claimants. Plaintiff first acquired knowledge of what was claimed in regard to the road a few weeks before this action was commenced. In our opinion the failure of the public to assert any right to the strip in question for nearly thirty years, and the long continued and adverse use and occupation by plaintiff and his grantors, in good faith, should estop the public from now asserting a right to the land. The evidence shows that the case is within the rule announced in *Orr v. O'Brien*, 77 Iowa, 253, and *Davies v. Huebner*, 45 Iowa, 574.

We conclude that plaintiff is entitled to the relief demanded. It follows that the county of Jasper is not liable for damages. The judgment of the district court, as to the appeal of both plaintiff and the county of Jasper, is REVERSED.

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WM. DEERING & Co., Appellant, v. GRUNDY COUNTY NATIONAL BANK, Appellee.

Principal and Agent: RATIFICATION. An agent engaged in the sale of agricultural implements was required, under contract with his principal, to make all notes taken in the course of the business of the agency payable to the order of the principal; and on blanks furnished by them. A number of notes so made were indorsed by the agent in the name of the principal and sold to the defendant for less than their face, and a considerable portion of the money received thereon was sent by the agent to the principal, who, without knowledge of the facts, credited the amount on an account against the agent for goods sold. At the time of the purchase of the notes the defendant knew that the agent was exceeding his authority, and that a portion of the money paid thereon was to be sent to the principal. With knowledge of the above facts, with the exception of the form of the indorsement, the principal commenced an action of replevin to recover possession of the notes. *Held*, that the principal was not entitled to the notes without surrendering the money received thereon, and that by electing to retain the fruits of the sale the principal ratified the unauthorized act of the agent, and was bound by the terms of the agent's agreement. *Held*, further, that in such action the principal could not be heard to say that his ratification of said sale was made in ignorance of material facts which inquiry would have revealed.

Appeal from Grundy District Court.—HON. C. F. COUCH, Judge.

TUESDAY, OCTOBER 21, 1890.

ACTION brought by plaintiffs to recover the possession of certain promissory notes. Upon filing its answer, defendant asked to have the cause transferred to the equity docket, and that was done, and the cause was thereafter treated as in equity. After a hearing upon the merits, judgment was rendered in favor of defendant. The plaintiffs appeal.

J. J. Tolerton, for appellant.

Rea & Hays, and *Boies, Husted & Boies*, for appellee.

ROBINSON, J.—Mrs. F. B. Dodd succeeded her deceased husband as agent for plaintiffs at Grundy Center, and acted as such agent during the year 1887. The business was carried on with the aid of a brother-in-law named E. H. Dodd, and included the sale of binders, mowers, attachments and appurtenances of various kinds, including extras and repairs, and binding twine. The contract of agency required Mrs. Dodd to make all notes taken payable to the order of plaintiffs, on blanks to be furnished by them. The notes in suit amounting to three hundred and twenty-four dollars, exclusive of interest, were so taken for property of plaintiffs sold under the contract of agency. In September, 1887, they were sold to defendant by Mrs. Dodd, E. H. Dodd acting for her in the transaction, and indorsed by him in the name of the plaintiffs. The form of the indorsement was as follows: "Pay to the order of the Grundy County National Bank, demand and notice waived." The amount received for the notes was three hundred and eighteen dollars and ninety-two cents, of which three hundred dollars were at once sent to plaintiffs by drafts, with instructions to apply it on the account of Mrs. Dodd. Plaintiffs had no knowledge of the source from which the money was obtained, and gave Mrs. Dodd credit for it on the twine and repairs account, and on a balance due for the previous year. They received from her a further sum of one hundred and fifty dollars, in October of the same year.

Before this action was commenced, plaintiffs were informed of the purchase of the notes by defendant, and that the proceeds thereof had been paid to them. A writ of replevin was issued upon the filing of the petition, and a bond and some of the notes in suit were taken thereunder and delivered to plaintiffs. The district court rendered judgment in favor of defendant for the amount of the notes so taken. Appellants waive all objection to the action of the district court in transferring the cause to the equity docket, and it will, therefore, be tried as in equity, triable here *de novo*.

Mrs. Dodd claimed some right to sell the notes in suit, and remit the proceeds thereof, less a discount, to plaintiffs, by virtue of a custom or method of doing business which has been practised by her husband. But it is shown that plaintiffs had no knowledge of such a custom, and never authorized it, and it must be conceded that the sale of the notes was wholly without authority, and that defendant had constructive notice of that fact from the form in which the notes were drawn.

The appellants argue with much earnestness that the facts of this case distinguish it from *Eadie v. Ashbaugh*, 44 Iowa, 519, and similar cases, for the reason that the sale of the notes was made, and the money remitted by its special agent, and the transaction was had with a person who was charged with knowledge of the limited powers of the agent, and of the fact that he was exceeding his authority. These facts would have an important, if not controlling, influence in the determination of the case under some circumstances. But, in this case, there is no ground for questioning the good faith of the defendant and Mrs. Dodd. It was known to the bank when it paid for the notes that the money, or nearly all of it, was to be sent to plaintiffs, and it had reason to believe that all of it to which plaintiffs were entitled would be so sent. Mrs. Dodd believed, from the practice of her husband, already mentioned, plat the sale was proper, and, in part, for the benefit of plaintiffs. Three hundred dollars of the money received was used in buying the drafts which were sent to plaintiffs, and the remainder was paid their agent the next month, although it may be that the identical money received was not so paid. It is true that plaintiffs received the money without knowledge of these facts, and that they applied it on other accounts than for the machines for which the notes were given, as they had an apparent right to do; but it does not appear that they suffered prejudice in consequence. They were informed of the sale before this action was commenced. Had they then tendered a return of the money received,

and demanded the notes, a different question would have been presented. They did not do that, but claimed a right to retain the money while demanding a return of the notes. They are not entitled to both. While the sale was wholly unauthorized, yet, by electing to retain its fruits after receiving knowledge of the fact that they had them, they ratified the unauthorized act of their agent, and must be bound by the terms of her agreement. *Eadie v. Ashbaugh, supra; Farrar v. Peterson*, 52 Iowa, 420; *Beidman v. Goodell*, 56 Iowa, 592; *Elwell v. Chamberlin*, 31 N. Y. 611; *Garner v. Mangam*, 93 N. Y. 642. It was said in *Davenport, etc., Ass'n v. North American Fire Ins. Co.*, 16 Iowa, 74, in effect, that whatever an agent with special or limited powers does, "beyond his authority, is void unless ratified, and that without affecting the validity of what was done within the scope of his powers." The case of *Roberts v. Rumley*, 58 Iowa, 301, is to the same effect. It seems to be the thought of appellants that, because Mrs. Dodd had special power to sell machines, and remit money therefor, the plaintiffs might ratify her act in sending the money, without ratifying it in selling and indorsing the notes. But the two acts cannot be thus separated. One depends upon, and is the result of, the other. Together they constitute only one transaction, and it must be ratified or disapproved as a whole.

It is said that, although it is true plaintiffs knew of the sale before the action was commenced, yet there were some facts connected with it that were not fully disclosed, as, for example, the form of the indorsements and the liability they created. But plaintiffs were advised of the sale, and had the opportunity to inform themselves in regard to all its conditions. They neglected to do so at their peril, and cannot now take advantage of their want of information. We conclude that the judgment of the district court was correct. AFFIRMED.

DAVENPORT WOOLEN MILLS COMPANY, Appellee, v. H. & A. NEINSTEDT *et al.*, Appellants.

1. **Copartnership: LIABILITY OF THIRD PERSONS: ESTOPPEL.** A traveling salesman, engaged in selling goods by sample upon the premises of defendants, inquired of one of the partners as to whom a gentleman present, and recommending the purchase of certain goods, was, and was informed that he was the father of the partner, and was a member of the firm. The father was within hearing distance during such conversation, and made no denial of the truth of the above statement. The firm-name did not indicate that the father was a partner, but the plaintiffs extended credit to defendants upon the faith of the son's representation, and reports of the father's financial responsibility. *Held*, that the evidence was sufficient to support judgment making the father liable to plaintiffs as a member of the firm, notwithstanding his specific denial that he held such relation, or that he heard the above conversation with his son.

2. ——: **EVIDENCE.** Letters written by the father subsequent to the extension of credit by the plaintiffs, and indicating a partnership relation in fact, *held*, admissible in support of that issue.

Appeal from Floyd District Court.—HON. G. W. RUDDICK, Judge

TUESDAY, OCTOBER 21, 1890.

H. & A. NEINSTEDT were the sons of Charles Neinstedt, Sr., and, from 1882 to 1884, were a firm doing business as merchants at Rudd, Iowa, under the firm-name of H. & A. Neinstedt. In 1884, H. Neinstedt died, and A. Neinstedt continued the business in the firm-name. August 16, 1888, the plaintiff firm, through its agent, S. A. Jennings, sold H. & A. Neinstedt a bill of goods amounting to two hundred and twenty-four dollars and nineteen cents, and this action is to recover therefor. Charles Neinstedt is made a party defendant, and his liability sought to be established on one of two grounds: *First*, that he was actually a

member of the firm; or, *second*, that he permitted himself to be so held out as a member of the firm; that plaintiff believed him to be such, and, with such belief, sold to the firm the bill of goods in question. The answer is a denial. The cause was tried to the court without a jury, and it gave judgment for the plaintiff, from which Charles Neinstedt appealed.

P. W. Burr, for appellant.

R. G. Reiniger, for appellee.

GRANGER, J.—The main point of the controversy is as to the sufficiency of the evidence to sustain the finding of the district court. It is a law action, and, if the evidence is such as to be a basis for the finding of the court on either ground upon which recovery is sought, we cannot disturb the judgment because of a want of evidence.

1. COPARTNERSHIP: liability of third persons: estoppel.

S. A. Jennings was the plaintiff's salesman, and was a stranger to the defendant and members of the firm. The name of the firm indicated two members. On the day of the sale in question, Charles Neinstedt, Sr., resided in a part of the building in which the store was, and was in the store when Jennings was there, and Jennings, as a witness for plaintiff, states as follows: "I am acquainted with Charles Neinstedt; met him last season. I called on the firm of H. & A. Neinstedt in June of last year, at their store in Rudd. The younger Neinstedt was in, and I opened my goods, showed them to him, and made him some prices. He concluded to purchase, and did so. While the goods were on the counter, Charles Neinstedt—I don't know the names of these parties only as I have learned since the above transaction; they gave me the name of H. & A. Neinstedt—came in and asked the younger Neinstedt if he had bought. He said he had, and showed him what he had bought. He asked him why he didn't buy more, showed some goods he thought they could use,

and insisted upon his buying some more, which he did. While he was looking at them, I said to the younger Neinstedt, 'Who is this?' He said, 'It is my father.' I said, 'Is he a member of the firm?' He said, 'He is.' The old gentleman was within hearing distance when this was said. We were close together, somewhere like three and a half feet. After that they added to the order. Mr. Charles Neinstedt selected the articles that were added. I inquired into the credit of all three of the parties, and reported to the plaintiff who composed the firm of H. & A. Neinstedt. I reported that the old gentleman was represented to me as being well fixed, had quite a quantity of land, a good farm."

If Jennings' statements are true, and Charles Neinstedt, Sr., heard the statement that he was a member of the firm, and plaintiff sold the goods with that belief, the liability of Neinstedt would be unquestioned. A. Neinstedt left in December, 1888, and the business of the firm was closed by attachment at the instance of appellant. The appellant in his testimony makes specific denials of his being a partner in the firm, or having any interest therein. He concedes that he had loaned money to the firm, and paid for it some debts, for which he is its creditor. He denies that he ever purchased goods for the firm or sold goods for it. He makes specific denials of the statements by Jennings, as to his interference when the goods were purchased other than being present, and denies hearing his son say that he was a member of the firm. There is considerable other evidence in detail, but nothing to obviate the plain and pointed conflict as to the conduct of appellant. Appellant argues this branch of the case upon the probabilities arising from the respective statements of the parties. That was a question for the district court, and to be decided by the weight of evidence. We agree with appellant that, if he did not hear the statement of his son that he was a partner, it could not bind him; but we do not think that his statement, that he did not hear it, is conclusive on that point. There are the statements of Jennings of how close the three were together,

and what they were doing, and how the words were spoken, and the finding of the district court on that question concludes us.

We have treated the case on this branch independently of other facts as to which some authorities are cited. If appellant knew that he was represented to Jennings as a member of the firm, and, with such knowledge, he participated in the purchase of the goods, and plaintiff sold upon such belief, appellant is now estopped to deny that he was a member. The evidence will sustain such a finding.

II. The following letters were put in evidence by the plaintiff, against the objections of the appellant that they were incompetent and immaterial, and that it is not shown that plaintiff had knowledge of, or acted upon, them:

2. —: evidence.

"RUDD, IOWA, December 3, 1888.

"*Messrs. James Foster & Co.*

"GENTLEMEN:—I have just taken hold and am trying to straighten out the affairs of H. & A. Neinstedt. I am sorry to say that, owing to my son's slack habit, his collections have not been properly attended to, and this is the sole cause of his not being able to meet his bills promptly. I have stopped all credit business, shall force collections to the best of my ability, and will remit as fast as anything is collected. You will, therefore, oblige me to withhold your draft, as I could not meet it on presentation, but you will not have to wait very long. Yours truly,

"CHAS. NEINSTEDT, SR."

Exhibit C. Offered by plaintiff.

"RUDD, IOWA, December 3, 1888.

"*Messrs. Charles City W. P. Co.*

"GENTLEMEN:—Inclosed please find draft for seventy-five dollars. Please ship us to-day twenty-five sacks family flour and five sacks of fancy patent. Pay for above out of this draft and credit balance to account of H. & A. Neinstedt. H. & A. N.'s account will be straightened out in a short time. We have stopped

crediting, and are now collecting for all there is in it, and if reasonably successful we shall soon be in shape to pay your account. If not at one time, we will reduce it as fast as we get in funds to divide up between our creditors. Please ship the above at once, and oblige, Yours truly, H. & A. NEINSTEDT.

"Per. CHAS. NEINSTEDT, SR."

It will be seen that the letters bear date after the purchase of the goods, and consequently plaintiff could not have relied upon them in making the sale, and we think them immaterial upon the question of appellant's being estopped because of his conduct; but it is to be kept in mind that the case presented another issue, that of appellant being an actual partner, and upon that issue the language of the letters shows that these were material. If, as appellant urges in reply, there was an utter failure to establish an actual partnership with him, still the admission of the evidence tending to establish it would not be error. The court would consider the evidence, and find the facts accordingly.

No other questions demand consideration, and the judgment is AFFIRMED.

W. F. JOHNSTON, Appellee, v. JOHN A. MCPHERRAN, Appellee, AND A. S. MCPHERRAN *et al.*, Appellants.

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1. **Appeal: RECORD: DOCUMENTARY EVIDENCE.** Where the transcript of the reporter's notes shows that certain documents were offered in evidence, identified by exhibit marks, and, with two depositions of a witness named, were read upon the trial; and attached to such transcript are documents bearing exhibit marks identical with those called for in the transcript, and two depositions of the said witness, entitled as in the same cause, and filed in the office of the clerk of district court; and the transcript contains a copy of the judge's certificate to the original report of the evidence in short-hand, certifying that the same, together with the documentary evidence therein referred to, contains all the evidence offered; and the documents and depositions set out in the abstract are identical with those attached to said transcript, the identification of such documents and depositions will be deemed sufficient.

2. **Fraudulent Conveyance of Real Estate: MORTGAGE: HOMESTEAD.** Where one makes a conveyance of real estate without consideration, and presumably in fraud of creditors, and under agreement for a reconveyance thereof when requested, he retains no such interest therein, as, upon his subsequent marriage, and occupancy of the premises with his family, will enable the wife to acquire a homestead interest in said property as against said grantor's individual conveyance thereof in pursuance of a power of attorney from the grantee under said fraudulent conveyance.

Appeal from Tama Circuit Court.—HON. C. HEDGES, Judge.

TUESDAY, OCTOBER 21, 1890.

PLAINTIFF brought actions to foreclose two mortgages executed by John A. McPherran, by his attorney in fact, A. S. McPherran, to secure certain promissory notes of John A. McPherran. The first mortgage is to the Ætna Life Insurance Company, dated June 4, 1872, on the northeast quarter of section thirty-six, township eighty-five, range fifteen, and northwest quarter of section thirty-one, township eighty-five, range fourteen, Tama county, which note and mortgage were assigned to appellee. The other mortgage is to appellee, dated December 13, 1876, and is upon said northwest quarter of section thirty-one. John A. McPherran was served by publication, and, failing to appear, defaults were entered, and judgments rendered against the land. Appellants, A. S. McPherran and Mary J. McPherran, having been made defendants, as claiming some interest, appeared and answered claiming a homestead in said northwest quarter of section thirty-one, and contesting the amount due upon the mortgage notes. The cases were consolidated, and, after trial had, decree was entered against appellants, from which they appeal. The further facts necessary to be considered appear in the opinion.

Caldwell & Drahos and *Stivers & Strong*, for appellants.

C. B. Bradshaw and *E. C. Ebersole*, for appellee.

GIVEN, J.—I. The appellee moves to strike parts of appellants' abstract, wherein certain documents and depositions are set out as having been offered in evidence, on the grounds that the same are not sufficiently identified. The transcript of the reporter's notes shows that documents were offered and identified by exhibit marks, and that two depositions of John A. McPherran were read in evidence. Attached to this transcript are documents bearing exhibit marks identical with those called for in the transcript, and two depositions of John A. McPherran entitled as in these cases, and filed in the office of the clerk. The transcript also contains a copy of the judge's certificate to the original report, in shorthand, certifying "that the same, together with the documentary evidence therein referred to, contains all the evidence offered." Such identification was held sufficient in *Way v. Council*, 76 Iowa, 741. The documents and depositions set out are identical with those in the transcript, and there is no reason to doubt that they are the same that were offered in evidence. Appellee's motion to strike is overruled.

1. APPEAL: record: documentary evidence.

II. The facts relating to the question of homestead are these: September 10, 1870, A. S. McPherran, then unmarried, was the owner of the lands in question. At that time, and in consequence of some trouble, the nature of which does not appear, he deeded the lands to his brother, John A., without consideration, and with the understanding that John A. would reconvey whenever requested. At the same time John A. McPherran executed a power of attorney to A. S. McPherran, authorizing him to sell, lease, mortgage, and otherwise fully control the land. The deed was recorded September 29, 1870, and the power of attorney in May, 1872. In March, 1871, appellants intermarried, and soon thereafter commenced improving the quarter in section thirty-one by erecting a dwelling on the northwest forty thereof, into which

2. FRAUDULENT conveyance of real estate: mortgage: homestead.

they moved. In June, 1872, A. S. McPherran, by virtue of his power of attorney from J. A. McPherran, executed the notes and mortgage to the Ætna Insurance Company, and on December 13, 1876, by virtue of the same authority, executed the mortgage to appellee. Some time in 1874 or 1875, John A. McPherran executed a quitclaim deed to A. S. McPherran for said northwest quarter of section 31, which deed was never placed of record, nor disclosed to the public, nor to the appellee. On December 15, 1876, appellants joined in a deed for the two quarter sections to John A. McPherran to correct the former deed from A. S. McPherran to John A. McPherran. This deed was also duly recorded.

Appellants' contention is that, at the time of their marriage, A. S. MePherran had an interest in these lands; that by the marriage the rights of his wife in that interest became vested, and that she did not join in any conveyance thereof at or before the execution of these mortgages. The appellants rely upon *Cotton v. Wood*, 25 Iowa, 46; *Chase v. Abbott*, 20 Iowa, 158, and *Stinson v. Richardson*, 44 Iowa, 375. The facts in this case being entirely different, those cited are not in point. In those cases there was an interest to vest in the wife, but in this we think the husband had no interest in the lands in question at the time of their marriage that the law would enforce. He had conveyed the lands before marriage by deed absolute on its face, but without consideration, and because of some trouble that had come upon him. We cannot conceive of any trouble that would cause such a conveyance, but a fear of creditors, and if the conveyance was made to defraud creditors, as we conclude it was, then, as to John A., the appellant, A. S., was without remedy, as the law would not permit him to benefit by his own wrong, by compelling a reconveyance. It follows, therefore, that at the time of their marriage A. S. McPherran had no interest in these lands which the law would enforce, and, therefore, no interest to become vested in his wife.

Another reason why appellants' claim to homestead should not be sustained is that, on December 15, 1876, they joined in a deed to John A. McPherran, to correct and perfect the deed theretofore executed to him by A. S. McPherran. True, this correction deed was not executed until two days after the last mortgage, but it was executed solely to correct the former deed, and by signing it Mrs. McPherran signed the same joint instrument with her husband, by which she concurred in the former conveyance.

It is contended that, if appellants ever had a homestead in this land, they had abandoned it. Being clearly of the opinion that appellants have no homestead rights in the land, for the reasons already stated, we need not determine whether the facts proven would constitute an abandonment or not.

III. The notes and mortgage executed to appellee were given to secure a loan negotiated by Ebersole & Willett, as attorneys for John A. and A. S. McPherran. The mortgage being junior to that to the Ætna Insurance Company, and said attorneys having notes in their hands belonging to A. S. McPherran, it was agreed that they should collect said notes, and apply the proceeds, less their charges upon the mortgage debt, to appellee. Appellants contend that the notes were pledged as collateral security for the mortgage debt, and that the full amount realized thereon, less collection fees, should be applied thereon. There were two separate accountings and settlements between A. S. McPherran, appellee and the attorneys, of the amounts collected, and the amount to be credited on the mortgage debt agreed upon and credited.

A further discussion of the details of this transaction is unnecessary. It is sufficient to say, that we have examined the record with care, and are satisfied that the amounts found by the circuit court are correct. Our conclusion is that the decree of the circuit court should be AFFIRMED.

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D. N. SMITH, Appellee, v. C. A. EALS *et al.*, Appellants.

1. **Bill of Exchange**: REPLEVIN: WRIT SERVED BY CONSTABLE. A writ of replevin issued out of the district court may be served by a constable.

2. ——: EVIDENCE: APPEAL. Questions pertaining to issues upon which no evidence was introduced in the trial court will not be considered in the supreme court.

3. ——: ALTERATION: INNOCENT PURCHASER: EVIDENCE. The presumption that the holder of a bill of exchange, acquired before maturity, is a purchaser for value, and without notice of defenses, will be rebutted by affirmative proof of a material alteration thereof since its acceptance by the drawee, and will put upon the holder the burden of showing that he purchased the same in good faith, and without notice of the alteration.

4. ——: INVALIDITY: REPLEVIN. The acceptor of a bill of exchange, that has become void in the hands of the holder thereof, may maintain replevin for the possession of the same.

Appeal from Taylor District Court.—HON. R. C. HENRY, Judge.

TUESDAY, OCTOBER 21, 1890.

THIS is an action of replevin to recover the possession of two accepted drafts. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal.

Flick & Thomas, for appellants.

Crum & Haddock and *J. E. Huston*, for appellee.

ROTHROCK, C. J.—I. The drafts in question were drawn by Hall & Co., by Thomas E. Hall, upon the plaintiff, and payable to the order of Thomas E. Hall, and accepted by the plaintiff at the time they were drawn. Both instruments were dated January 8, 1889, and one was payable September 1, 1889, and the other

1. BILL of exchange: replevin: writ served by constable.

December 1, 1889. After the instruments became due, they were sent by H. D. Booge & Co., of Topeka, Kansas, to the defendant Eals, a banker at Clearfield, Iowa, and the plaintiff commenced this action, and replevied the acceptances upon the general ground stated in the petition, that he was the owner, and entitled to the possession of them. The defendant Eals answered, disclaiming any interest in the subject of the action. Booge & Co. answered, claiming that the plaintiff, by fraud and misrepresentation, induced Booge & Co. to send the acceptances to this state for the purpose of instituting this action; and that the jurisdiction of the cause was, therefore, obtained by fraud. They further set forth that they were "purchasers for value of the instruments in suit before maturity." The plaintiff by reply denied that he was in any way instrumental in causing the notes to be sent to this state; and he further replied as follows: "The plaintiff further states that said instruments, now purporting to be accepted time drafts, are forgeries, and are not the instruments as executed, and have been added to and materially changed since execution."

It appears from the return on the writ of replevin that it was served by a constable. The defendants by motion demanded an order for the return of the notes to them, because the writ was not served by the sheriff. The motion was overruled. We do not discover any error in this ruling. The writ had been properly served, and it does not appear to us to be a material question whether it was served by a sheriff or by a constable.

II. The question as to the alleged fraudulent acts of the plaintiff in procuring the instruments to be sent into this state ought not to be considered as in the case. There was no evidence to sustain that averment of the answer, and the court could have very properly directed the jury to find for the plaintiff on that issue. We do not determine whether this averment of the answer would be any defense to the action if proved.

2. ——: evidence: appeal.

III. It appears without conflict in the evidence that the body of the drafts was in this form: * * *

3. —: alteration: innocent purchaser: evidence.

"Pay to the order of Thos. E. Hall four hundred dollars, with exchange ——, value received, and charge to the account of." The words before and after the blank were printed, and the instruments were complete and perfect in form and meaning, without words being filled in the blank. But the blank was filled with the words following: "and ten-per-cent. interest after date, if not paid when due." There was not space to write these words in the blank, and part of them are interlined. The evidence shows beyond all question that these words were added to and written in the instruments after they were accepted by the plaintiff, and without his knowledge or consent. There is no question but what this was a material alteration of the acceptances, and rendered them void as between the plaintiff and Hall. The only real question in the case is whether, under the evidence, Booge & Co. are entitled to recover on the acceptances. There is no evidence showing when or by whom the instruments were altered. They were indorsed by Hall in blank. The presumption is that they were purchased by Booge & Co. for value, and without notice of any defense that might be interposed thereto. But, when it was shown that they had been materially altered, this presumption was rebutted, and it was incumbent on Booge & Co. to show that they purchased them in good faith, and without notice of the forgery. *Robinson v. Reed*, 46 Iowa, 219; *Scofield v. Ford*, 56 Iowa, 370; 1 Daniel, Neg. Inst., sec. 815; 2 Pars. Notes & B. 576, and authorities cited. We do not determine that the drafts are absolutely void in the hands of Booge & Co., because it is unnecessary to determine that question in this case. No attempt was made by Booge & Co. to prove that they were *bona fide* holders of the instruments.

IV. It is claimed by counsel for appellants that replevin is not the proper remedy for the plaintiff. If

4. ——: invalidity: replevin.

the instruments are void by reason of the forgery it is the plaintiff's right to recover possession of them. *Savery v. Hays*, 20 Iowa, 25; *Sigler v. Hidy*, 56 Iowa, 504.

We have thus disposed of all the questions in the case without a review of the charge of the court to the jury. There is really no conflict in the evidence The cause turns upon the law applicable to undisputed facts, and it is not necessary to discuss questions raised as to the correctness of the instructions. The judgment of the district court will be AFFIRMED.

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GEO. R. NEWELL & Co., Appellee, v. MARTIN & WAGNER *et al.*, Appellees, AND FIRST NATIONAL BANK OF ROCK RAPIDS, Garnishee, Appellant.

1. **Partnership Assets**: CONVEYANCE: DEBT OF INDIVIDUAL PARTNER. A conveyance of partnership property in payment in part of the firm indebtedness, and in part of the indebtedness of one of the partners, without the consent of all the partners, is void to the extent of the indebtedness of the individual partner, and may be attacked by a creditor of the firm.

2. ——: ——: APPEAL: ERROR NOT WARRANTING REVERSAL. A judgment will not be reversed in the supreme court because of an erroneous instruction to the jury, when such judgment was demanded under the evidence and other instructions correctly given; even though the verdict of the jury may have been based upon the erroneous instruction.

3. ——: ——: EVIDENCE. In an action involving the validity of a conveyance of the property of a copartnership a member of the firm may be permitted to testify that his signature to such instrument was obtained without his knowledge of the fact that it was intended in part in payment of the private indebtedness of one of his copartners.

4. ——: ——: ——. In such action evidence that such partner assented to said conveyance, with full knowledge of its purpose, after the rights of creditors had attached, is incompetent.

Appeal from Lyon District Court.—HON. C. H. LEWIS, Judge.

TUESDAY, OCTOBER 21, 1890.

ACTION in attachment wherein the First National Bank of Rock Rapids was served with garnishment process, upon the claim that it held property of defendants, or was their debtor. A judgment was rendered against the garnishee after answer denying indebtedness, and a trial upon issues founded thereon. The garnishee appeals.

E. C. Roach, for appellant.

E. Y. Greenleaf, for appellees.

BECK, J.—I. The undisputed facts of the case, so far as they are involved in the controlling question of law demanding consideration, are these: The defendants Martin & Wagner, mercantile partners, were, as a firm, indebted to the garnishee for the sum of about three thousand dollars, and Martin was indebted to it individually in nearly the same amount. In payment of these debts, the firm transferred by bill of sale, and delivered to the garnishee all its stock in trade, all notes and accounts and furniture in its storehouse, which constituted all the property owned by it. The transfer was made in payment of *bona fide* debts, and there was no intentional fraud connected with it. At the time of the transfer, the firm was insolvent, which was known to the garnishee, through its president. This action was begun the day following the transfer; and the bank, being duly served with garnishment process, answered and pleaded that it had no property of defendants in its possession, and owed it nothing. The jury, under instructions of the court, found for plaintiff. Judgment was entered on the verdict. Under the verdict and judgment, the transfer of property to the garnishee to the extent necessary for the payment of the firm debt to the garnishee was held to be valid, while, as to the transfer in payment of the debt of Martin, it was held to be void.

1. PARTNERSHIP assets: conveyance: debt of individual partner.

II. The district court gave to the jury the following instruction: "If Wagner did not assent nor agree to the making of the bill of sale for the payment of the private debt of Martin, then the garnishee cannot hold the bill of sale for the private debt of Martin. If the firm of Martin & Wagner, at the time of the making of the bill of sale, was insolvent, and Richards knew it, then the bill of sale was not good for the payment of the individual debt of Martin. If, at or before the making of the bill of sale, Wagner assented or agreed to the payment of the individual debt of Martin by the bill of sale, then the same is good for the payment of the individual debt of Martin, unless the firm of Martin & Wagner were then insolvent, and Richards then knew it, in which case the bill of sale would not be good for the payment of the Martin debt." It will be observed that this instruction holds, *first*, that, if Wagner did not assent to the bill of sale for the private debt of Martin, as to that debt it is void; *second*, if the firm was insolvent, and Richards, the president of the bank, knew it, the bill of sale, so far as it provided for the payment of Martin's debt, is void.

The garnishee complains of these instructions. In our opinion, they are correct expressions of the law. It cannot be doubted that, "if Wagner did not assent nor agree to the making of the bill of sale for the payment of the private debt of Martin," it is void as to that debt, and the garnishee can claim no protection under the bill of sale, so far as it is based upon Martin's individual debt as a consideration. If, for any reason, Wagner's signature was had to the bill of sale without his assent to the conveyance of firm property for Martin's individual debt, the instrument is without effect, so far as payment of that individual debt is concerned. If its execution by Wagner was procured without such assent, it was an actual fraud, which would avoid the instrument, so far at least, as the property conveyed in payment of Martin's debt was concerned; and the garnishee, under such circumstances, could not claim

under it. This statement of the law demands no citation of authorities in its support.

III. We need not determine the correctness of the other rule of the instructions as to the effect of the firm's insolvency, and Richards' knowledge thereof, for this reason: The evidence establishes, without dispute, that Wagner did not assent to the bill of sale. He and Martin both so testify, and neither Richards nor any other witness gives evidence contradicting them on this point. Under the first rule of the instruction the jury were bound, under this evidence, to find for plaintiffs. Had they found otherwise, their verdict would have been set aside, as in conflict with the evidence. If the second rule of the instruction, as to the effect of the insolvency of the firm, and Richards' knowledge thereof, be erroneous, it would not demand a reversal of the judgment, for the verdict was required by the other rule, under undisputed evidence. Even if the jury found their verdict under the second rule, that would not require it to be set aside, for it was demanded under the other rule, and the evidence in the case. While the verdict may have been rendered under an erroneous instruction, it was demanded by a correct one, and the evidence of the case to which it is applicable

2. —: —: appeal: error not warranting reversal.

IV. It is insisted that Wagner ought not to be permitted to show that he did not assent to the bill of sale, being precluded from such defense by the fact that he signed the instrument. It may be that if, through negligence or want of attention, he signed the instrument, and was not induced to do so by concealment or fraud, he could not be permitted to deny the validity of the instrument. But if he was induced to execute the bill of sale through fraud or concealment, or by any act of the other parties to the instrument intended to secure his signature when he was ignorant of the effect of the instrument as to the conveyance of property in payment of Martin's debt, it is void, so far certainly as to the property conveyed for

3. —: —: evidence.

that purpose. The evidence showing that Wagner did not know of, nor consent to, the payment of Martin's debt, a fact which was kept from him by the other parties, was rightly received in evidence against the garnishee's objection.

V. Evidence was rejected tending to show that Wagner assented to the bill of sale, after it was exe-

4. THE same. cuted. But it does not appear that this was before the rights of the creditors had attached. But it cannot be held that Wagner at any time after this proceeding was commenced could have consented to the bill of sale, so as to cut off the rights of the creditors to the part paid out of the partnership property. The evidence was rightly rejected.

This discussion covers and disposes of all questions in the case. The judgment of the district court is AFFIRMED.

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J. C. PAINTER, Appellee, v. POLK COUNTY, Appellant.

Payment: MISTAKE OF LAW. The voluntary payment by a county, through its authorized agents, of fees claimed by one for services rendered in his capacity as sheriff of the county, under the mutually mistaken belief that the county is legally bound therefor, is a mistake of law and not of fact, and will not support an action for the recovery thereof by the county

Appeal from Polk District Court.—HON. CHARLES A. BISHOP, Judge.

WEDNESDAY, OCTOBER 22, 1890.

ACTION to recover fees due to plaintiff for services rendered as sheriff of said county. Plaintiff's claim is admitted, but defendant asks to be allowed as a counterclaim certain other fees paid to plaintiff to which he was not entitled under the law. The case was submitted to the court upon an agreed statement of facts, and judgment rendered in favor of the plaintiff.

Defendant appeals, assigning the rendering of the judgment as error.

C. P. Holmes, for appellant.

Cummins & Wright, for appellee.

GIVEN, J.--I. The agreed statement of facts is as follows: "It is agreed and stipulated between the parties hereto that, during the years 1884, 1885, 1886 and 1887, the plaintiff was the sheriff of Polk county, duly elected and qualified; that during these years he attended with prisoners before the court in this county; that for such service he presented his bills to the board of supervisors of defendant county, a copy of which said bills, so far as material, are hereto attached, and made a part hereof; that during said years the plaintiff also presented to said board of supervisors bills for the commitment and discharges of prisoners in cases where such prisoners were not actually committed and discharged from the jail, as shown by the records kept by the jailer of the persons received into and discharged from said jail, a copy of which said bill is hereto attached; that the defendant has paid plaintiff for and on account of such attendance the sum of three hundred and thirty-one dollars, and on account of such commitments and discharges the sum of seventeen dollars, said bills having been duly allowed, and warrants issued and paid, in the ordinary course of business; that said bills were presented and allowed upon the belief that the defendant county was legally liable to the plaintiff for services in attending with prisoners before the court, and was in the same manner liable for such commitments and discharges. There is now in hands of the defendant, and owing plaintiff, upon settlements of other accounts with the defendant, the sum of three hundred and forty-eight dollars, which is now retained by the defendant, awaiting the determination of the question as to whether or not defendant is entitled to recover of plaintiff the amount paid to him upon said bills for services

for attending before the court with a prisoner, and for commitment and discharge of prisoners not actually committed and discharged from custody in jail."

The mistake as to the law with respect to fees for attendance evidently arose from the fact that, under the Code of 1873, sheriffs were allowed for "attendance with a person before the court or judge when required, for each day one dollar." This was changed by chapter 115, Acts, Eighteenth General Assembly, the word "court" being omitted. In *Painter v. Polk Co.*, 70 Iowa, 596. it was held that, under this statute as changed, sheriffs were not entitled to fees for attending before a court with a prisoner. The three hundred and thirty-one dollars' fees for attendance in question were paid after the change in the law, and before the announcement of the opinion in *Painter v. Polk Co.*, *supra*, and the only question with respect thereto is whether, having been paid under a mutual mistake as to the law, the defendant is entitled to recover it back.

II. Appellant admits "the general proposition that payments made under misapprehension or mistake of law cannot ordinarily be recovered back," but insists that it does not apply to the payments of fees or salary made by public officers to public officers. To permit persons who have made a payment to plead ignorance of the law as a ground for recovering it back would be counter to that indispensable principle to civil government that all persons of sufficient age and sound mind are presumed to know the law, and would go far towards unsettling business transactions, and encouraging litigation. We discern no reason why the rule should be different in this case from what it would be between private individuals. The necessities for the rule are the same. *Gilman v. Des Moines Valley Ry. Co.*, 40 Iowa, 200, and *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, do not support appellant's position. In those cases it was held to be against public policy for an officer to contract for a different fee than that allowed by law. That was exclusively a question of public policy. In *Palo Alto Co. v. Burlingame*, 71 Iowa, 201, it was not

a question of recovering back a payment made, but whether the unauthorized act of the board allowing the clerk to retain fees to which he was not entitled was a good defense to an action for their recovery.

Cases are cited in support of the position that, when a party has paid money upon a consideration which is illegal, the law implies a promise on the part of the person to whom, or to whose use, it is paid, to refund. There is no question of illegal consideration before us. If there were, our inquiry would then be whether the courts would afford any relief to either party. In *Badeau v. United States*, 130 U. S. 439; 9 Sup. Ct. Rep. 579, the plaintiff was seeking to recover his salary as a retired army officer, while he at the same time had been accepting pay in the diplomatic service. The United States denied his right to recover, and sought to recover by way of counterclaim a large sum which it was claimed had been erroneously paid him without authority of law as his salary as an army officer, during which time he was not in fact in the army; and it was held, that the government could not recover money paid under the mistaken belief that there was a legal liability therefor.

In *Kraft v. City of Keokuk*, 14 Iowa, 86, the plaintiff sought to recover back money paid by him to defendant for a license, under a law which was afterwards held to be unconstitutional. This court held that he could not recover the money so paid, because paid under a mistake of law. The court says: "The law does not permit him to allege his ignorance, and make it the foundation of his right to recover back the money. The principle upon which courts refuse to relieve mistakes in law is, we suppose, the fact that the law presumes every man to be cognizant, not only of what are its provisions in force, but how far they are valid and operative."

The appellant contends that one hundred and sixty dollars of the amount paid for attendance, and seventeen dollars paid for commitments and discharges, were

paid under mistake of fact, and not of law. The agreed statement of facts does not support this claim. It not only fails to show that the payments were made under a mistake of fact, but expressly states that the claims were presented and allowed upon the belief that the defendant county was legally liable to the plaintiff. The judgment of the district court is AFFIRMED.

JOHN LIMING, Appellant, v. ILLINOIS CENTRAL RAIL-ROAD COMPANY, Appellee.

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Negligence: PERSONAL INJURY: PROXIMATE CAUSE. One of the defendant's engines having set fire to grass and weeds on its right of way opposite the premises of O., with whom the plaintiff resided, the plaintiff and O. sought to extinguish the flames, but were unsuccessful, and a high wind having carried the fire toward O.'s barn, which contained some horses belonging to the latter, the plaintiff entered the barn to save this property, but before returning therefrom the fire had encompassed the doorway of the barn, and the plaintiff in making his escape therefrom was badly burned, and his health and sight seriously impaired. *Held*, upon demurrer to plaintiff's petition, which alleged the above facts, and further, that the fire was caused by defendant's negligence, and that the plaintiff was free from negligence, that the negligence of the defendant was the proximate cause of the injury to the plaintiff.

Appeal from O'Brien District Court.—HON. C. H. LEWIS, Judge.

WEDNESDAY, OCTOBER 22, 1890.

ACTION to recover damages caused by a fire alleged to have been set out by defendant in operating its railway. A demurrer to the first count of the petition was sustained. The plaintiff, having elected to stand on his pleading, appeals from the ruling on the demurrer.

Hughes & Hastings, for appellant: The demurrer in fact presents but one question, namely: Do the facts

stated in this count of the petition show that defendant's negligence was the proximate cause of plaintiff's injury? The injury for which plaintiff sues is the direct consequence of the fire, a destructive force set in motion by defendant's negligence. This fire must be regarded as a continuing force. The person who negligently set out the fire is liable for all the injury caused thereby, unless it appears that some other force has interposed and become the immediate cause of the injury. *Brown v. C. M. & St. P. Ry. Co.*, 54 Wis. 342; *Small v. Railway Co.*, 55 Iowa, 582; *Kellogg v. Railway Co.*, 26 Wis. 23; *Krippner v. Biebl*, 28 Minn. 139; *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469. The original cause, the fire set out negligently by defendant, was not controlled by the agency of plaintiff. He did only what the law enjoined upon him to do, and, if he had stood by and permitted the property to be destroyed without making an effort to save it, he could not recover for the loss. *Kierman v. Heaton*, 69 Iowa, 138; *Hohel v. Muscatine*, 57 Iowa, 444; *Van Pelt v. Davenport*, 42 Iowa, 308; *Rexter v. Starin*, 73 N. Y. 601. If, therefore, while exercising such care, he is injured, the person guilty of negligence is liable. A party will not be prevented from a recovery, even where his own act is the more immediate cause of the injury, if that be an act which is, as to him, reasonably induced by a prior negligent or wrongful act of another, and without any concurring fault of the party injured. 1 Sutherland on Damages, p. 62; *Olliver v. La Valle*, 36 Wis. 592; *Wilson v. Railway Co.*, 26 Minn. 278; *Knapp v. Railway Co.*, 65 Iowa, 91. Many cases illustrating the doctrine of proximate cause are to be found in the books. For example, it is held that if a carrier negligently delays the transportation of goods, and, because of the delay such goods are injured by a flood, the company would be liable. *Lowe v. Moss*, 12 Ill. 477; *Reed v. Spaulding*, 30 N. Y. 630, *Railway Co. v. Reeves*, 10 Wallace, 190; *Hadly v. Trans. Co.*, 115 Mass. 304; *Pastene v. Adams*, 49 Cal. 87. That a party may recover for personal injuries received in attempting to save life or

property from the consequence of another's negligence or wrong doing, see *Cottrill v. Railway Co.*, 47 Wis. 634; *Linnehan v. Sampson*, 126 Mass. 506; *Rexter v. Starin*, 73 N. Y. 601; *Wasmer v. Railway Co.*, 80 N. Y. 212; 36 Am. Rep. 608. It may be contended that a different rule applies to this case, because plaintiff, at the time he received his injuries, was engaged in attempting to save the property of Ortman. But it cannot be said, in view of the facts of this case, that in what plaintiff did he acted merely as a volunteer, and not in obedience to a legal and moral duty.

John F. Duncombe, for appellee: The only question is, was the negligence of the defendant the proximate cause of the injury to the plaintiff. The case of *Pike v. Railway Co.*, decided May 15, 1889, 39 Fed. Rep. 255, is directly in point with the case at bar. Judge HOLT there says: "I cannot hold that *Railway Co. v. Kellogg*, 94 U. S. 469, is an authority to the position taken by the plaintiff that the question of remote or proximate cause must, under all circumstances, be submitted to a jury for decision. If upon the facts presented there is any question as to what was the proximate cause, then the case should go to the jury; but if the undisputed facts show, under well-established rules of law, what the proximate cause is, then manifestly the court should act accordingly. This position is recognized in the later case of *Scheffer v. Railway Co.*, 105 U. S. 249, where the supreme court held, as a matter of law, that the proximate cause of the suicide or death of the intestate was insanity, and that it was not due to the negligence of the company, whereby he suffered an injury eight months before." The case of *Seale v. Railway Co.*, 65 Texas, 274; s. c., 57 Am. Rep. 602, is directly in point with the one on trial. In that case a fire was negligently set by an engine. Plaintiff's minor daughter was burned to death trying to extinguish it. The court held the cause remote and that plaintiff could not recover. Another case is referred to in 50 Am. Dec., page 574, note, of *Hinchy v.*

Railway Co., 49 N. Y. Sup. 406, which is directly in point, where one trying to extinguish fire set by an engine had his hand burned. The plaintiff failed; the court holding cause remote. In the case of *Bosch v. Railway Co.*, 44 Iowa, 402, where, by the use of a street by a railroad company with tracks and embankment, the fire department was prevented from extinguishing the fire, being thereby shut off from the river, the court held the damages too remote, and the company not liable. This case refers to the case of *Insurance Co. v. Friend*, 7 Wall. 49, 50. Liability for wrongful acts extends only to damages which arise from the proximate and natural consequences of such acts. If the proximate and natural consequences are controlled by the unforeseen agency of a moral being capable of discretion, and left free to choose, the original cause ceases to be proximate. Natural, proximate and legal results are all for which damages can be recovered. 48 Am. Dec. 72, at bottom of page; *Donnell v. Fones*, 13 Alabama, 490. The rule of law is well established that in cases of tort it is necessary for the party complaining to show that the particular damages in respect to which he has proceeds are the legal, natural and direct proximate consequences of the wrongful act imputed to the defendant. Sedgwick on Meas. of Dam. [5 Ed.] p. 89; *Plumb v. Woodmansee*, 34 Iowa, 119. A leading case on the doctrine of *causa proxima et non remota spectatur* in Iowa, is *Dubuque Wood & Coal Ass'n v. Dubuque*, 30 Iowa, 176. The case of *Hampton v. Jones*, 58 Iowa, 319, bottom of page, division 11, is an example where the court held the damages too remote. The general subject is fully discussed under the head of damages in volume 5, American and English Encyclopedia of Law. The case of *Knapp v. Railway Co.*, 65 Iowa, 91, is not in point. There the injury was caused by the instinctive sudden act of the engineer. The following cases referred to by appellant, viz.: *Cottrill v. Railway Co.*, 47 Wis. 634; *Linnehan v. Sampson*, 126 Mass. 506; *Rexter v. Starin*, 73 N. Y. 601; *Wasmer v. Railway Co.*, 80 N. Y. 212; 36 Am. Rep. 608, are cases in which the sole question

is one of contributory negligence, and the precise point made in the case at bar is not made. They are all cases of instantaneous action, without time for reflection, or a voluntary action of the will—rather instinctive action than mental reflection. The plaintiff was a volunteer to save the property of Mr. Ortman, another party. He need not have exposed himself, but deliberately and voluntarily chose to do so, and did it at his own risk without any force, or other cause, except his own judgment and volition. We confidently rely upon the case cited in our argument, 65 Tex. 274; 57 Am. Rep. 602, which is exactly in point, and the case referred to in 49 N. Y. Sup. Ct. 406, is a much stronger case than this.

ROBINSON, J.—The allegations of the petition which the demurrer admits to be true are substantially as follows: On the third day of November, 1888, William Ortman owned, and with plaintiff and his family occupied, a certain farm in O'Brien county. Ortman owned some horses, which were kept in a barn on the farm, and plaintiff owned some hogs, which were kept in a pen outside the barn. On the day named, an engine on the railway of defendant set fire to grass and weeds on its right of way at a point opposite the premises of Ortman. A high wind was blowing at the time, which spread the fire rapidly, driving it in the direction of the barn. Plaintiff and Ortman saw the fire immediately after it started, and went to it, and tried to put it out. Failing in that, they retreated to a traveled way which crossed the prairie between the fire and the barn, and attempted to stop the fire by sprinkling water on the grass. Their efforts were ineffectual, and they then started to save the horses and hogs. They first entered the barn, the plaintiff believing that there would be ample time in which to remove the horses before the fire, which was more than one hundred feet away, could reach the building. Prior to that time the head fire had been running towards a point at one side of the barn, but at that time it reached higher ground, and, catching the full force of the wind, was driven directly

towards the barn. When the horses were unfastened, and were being taken from the barn, plaintiff discovered that the fire had reached the door which afforded the only means of escape, and that, in order to escape, he was compelled to and did pass through the fire; that in doing so both his legs, his right hip, both hands, and his right elbow were badly burned, his face was badly burned and disfigured, and his eyes injured. By reason of the injuries so received, plaintiff was confined to his bed nine weeks, and suffered greatly in mind and body, and his health has been seriously and permanently impaired. The first count of the petition also alleges that the fire was caused by negligence on the part of defendant, and that plaintiff was free from negligence. The demurrer is as follows: "Defendant demurs to the first count of plaintiff's petition for the following reasons: *First.* The allegations set out in the first count for personal injury to plaintiff do not show that the negligence of defendant was the proximate cause of the injury complained of. *Second.* The said count shows that the injury complained of was received by plaintiff while he was engaged in trying to save the property of one Ortman, and that said injury was not directly or approximately caused or contributed to by the negligence of defendant."

Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway." It is admitted that the damages in question were caused by a fire which the defendant set out in operating its railway, but it is said that the fire was not the proximate cause of the injuries sustained by plaintiff. It is further said that but for the intervention of his own voluntary act he would have sustained no injury, and, therefore, that his own act was the proximate cause of his injuries.

The question presented for our determination is not free from difficulty. Defendant is not liable unless its wrongful act was the proximate cause of the damages in suit. A careful writer has said: "The proximate

cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." 1 Shear. & Red. Neg., sec. 26. Also: "A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow, if they had been suggested to his mind." 1 Shear. & Red. Neg., sec. 29. In *Railway Co. v. Kellogg*, 94 U. S. 469 [24 L. Co-op. Ed. 259] it is said: "The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" See, also, 1 Suth. Dam. 47; *Brown v. Chi., Mil. & St. Paul Ry. Co.*, 54 Wis. 342; 11 N. W Rep. 356, 911; *Lowery v. Railway Co.*, 99 N. Y. 158; *Knapp v. Sioux City & Pac. Ry. Co.*, 65 Iowa, 91.

But it often happens that the wrongful act or negligence of a party would be harmless but for the voluntary act of the person injured, as in cases of injuries from defects in streets, sidewalks, roads and bridges; yet in a case of that kind the act of the person injured in traveling the defective way is not regarded as a new or independent cause of the accident which follows. If he be free from negligence he is entitled to recover for the injuries he sustains, for he was doing only what the law authorized, and what the corporation, responsible for the condition of the way, was bound to anticipate and provide for while the way remained open for travel. The negligence of the corporation is the proximate, although the act of the person injured is the more immediate, cause of the injury. 1 Suth. Dam. 62. One who, acting with reasonable prudence, voluntarily

exposes himself to danger for the purpose of protecting the person of another, may recover for the consequent injuries he receives from the person whose wrong caused the injury to himself, and the danger to the person he sought to aid. *Linnehan v. Sampson*, 126 Mass. 506; *Cottrill v. Railway Co.*, 47 Wis. 634; 3 N. W. Rep. 376; *Railway Co. v. Crosby*, 74 Ga. 737; *Eckert v. Railway Co.*, 43 N. Y. 502. The same has been held to be true of one who under similar conditions is injured in an attempt to protect his own property. *Wasmer v. Railway Co.*, 80 N. Y. 212; *Rexter v. Starin*, 73 N. Y. 601. In *Eckert v. Railway Co.*, *supra*, it was said, in effect, that a person might expose himself to greater danger without negligence in attempting to save human life than he could in attempting to save property. It is not claimed that the right to recover in such cases depends in any respect upon the legal liability of the person injured to do that which he was attempting to do when the injuries were received, but rather upon his moral obligation and right to do it.

In this case the plaintiff did not receive the injuries of which he complains in any attempt to protect human life, nor in trying to save his own property. So far as we are advised by the record, he was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors; and this would have been so notwithstanding the fact that defendant may have been liable for all loss which could occur, and that what he accomplished would inure to its benefit. It is the duty of everyone, according to the requirements of an enlightened and just public sentiment, to use reasonable efforts to preserve the property of others from threatened destruction; and, as is well known, it is a duty which people generally are quick to discharge. The defendant could have foretold, with almost absolute certainty, when it set the fire in question, that

plaintiff, being near, would use every reasonable means in attempting to save Ortman's horses from the flames, and there was nothing surprising or unusual in the attempt he made. Under the circumstances of the case, it was the natural and probable result of the wrong of defendant. A person would not be justified in exposing himself to as great danger in saving property as he would in saving human life, and whether the person injured acted with reasonable prudence would, in most cases, be a question of fact depending upon the circumstances under which the act was done. In *Harris v. Township of Clinton*, 64 Mich. 447; 31 N. W. Rep. 425, it was said that "it is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, * * * the defendant is liable."

The case of *Seale v. Railway Co.*, 65 Tex. 274; s. c., 57 Am. Rep. 602, is relied upon by appellee, and in some respects it seems to support the ruling of the district court. In that case the court says that the defendant should have anticipated that its negligence would endanger the property of plaintiff, and that she and perhaps others would attempt to extinguish the fire, but that it could not have anticipated that, in that attempt, life would have been lost without negligence on the part of the person killed. The conclusion of the court seems to rest upon the theory that the petition showed that the death of the deceased was the result of her own negligence. But, under the facts of this case as admitted by the demurrer, the plaintiff was not negligent. It is true that but for the voluntary act of plaintiff he would not have been injured. As we have seen, however, that act, although voluntary in one sense, was invited and induced by the wrong of defendant, and the consequent injuries were the natural and direct result of that wrong. The order of the district court is REVERSED.

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LAURA CRAMER, Appellant, v. W. F. CLOW *et al.*, Appellees.

1. **Adverse Possession:** EVIDENCE. **The defendants, claiming title under a warranty deed defectively acknowledged, entered upon a piece of wild land, and for more than ten years cultivated it, and paid the taxes thereon, and for nearly ten years previous to the commencement of this action had occupied it as a home, and made improvements upon it amounting to between three and four thousands of dollars. *Held*, that defendants were entitled to have their title quieted as against the plaintiff, who claimed title to the land under a warranty deed executed subsequent to that of defendants by the same grantor, but filed for record before the deed to defendants.**

2. **———:** QUIETING TITLE. **Actual adverse possession of real estate for ten years creates a title by prescription, and is a sufficient basis on which to maintain an action to quiet the title thereto.**

Appeal from Wright District Court.—HON. J. L. STEVENS, Judge.

WEDNESDAY, OCTOBER 22, 1890.

THIS action was commenced on the tenth day of December, 1887. The plaintiff claimed to be the owner of a farm which is in the possession of the defendants, and the prayer of the petition was that the title be quieted in the plaintiff. The defendants answered claiming that Harriet E. Clow was the owner of the land. A cross-petition was also filed, in which it was claimed that Harriet E. Clow was the owner of the land by a title acquired by adverse possession thereof for more than ten years, and also by a tax deed. This cross-petition was answered, and the answer was also made a cross-petition, and affirmative relief by quieting title in plaintiff was prayed by the plaintiff. When the cause was called for trial, the plaintiff withdrew, and dismissed her original petition. The cause was tried upon the cross-petition and answer thereto. A decree was entered quieting the title in Harriet E. Clow, and the plaintiff appeals.

Rep. (Neb.) 915; *Quinn v. Quinn*, 76 Iowa, 565; *Bunce v. Bidwell*, 43 Mich. 542; 5 N. W. Rep. 1023.

III. The foregoing considerations dispose of all material questions in the case. The defendant, Harriet E. Clow, also, claims title to the land under a tax deed. As we hold that her title by adverse possession is complete, we need not consider the claim made under the tax deed. The decree of the district court will be AFFIRMED.

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SARAH M. DOUGLASS, Appellee, V. GEORGE DOUGLASS, Appellant.

1. **Divorce**: CRUEL AND INHUMAN TREATMENT. The address of base epithets, such as, a bitch, hellyon, a son of a bitch, by a husband to his wife, accompanied with such threats of physical violence; as, shaking his fists in her face, and at times threatening to shoot her, and with occasional acts of violence toward the person of the wife, rendering her lame or bruised for some days, is such inhuman treatment as may be said, as a matter of law, to endanger the life of the wife, where the husband is a strong man physically, and possessed of an ungovernable temper, while the wife is not possessed of good health nor of much physical endurance; although the organization and temperament of the wife is such that the use of the base epithets alone could not be held, as a matter of law, to endanger her life.

2. ——: CONDONATION. Cohabitation with the husband after the commencement of a suit by a wife for divorce, upon the ground of inhuman treatment, will not constitute a condonation of the offense on account of which the divorce is asked, where the inhuman treatment is continued during the time of such cohabitation.

3. ——: ALIMONY. The amount of the defendant's property was variously estimated to be from twelve to thirty-seven thousands of dollars above all indebtedness. *Held*, that an award to the plaintiff as alimony of four-sevenths of a piece of property valued at fifteen thousands of dollars, and the sum of two hundred and fifty dollars for attorney's fee, was not excessive.

Appeal from the Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 22, 1890.

ACTION for divorce and alimony. There was a decree for the plaintiff, from which the defendant appeals.

Lutz & Sears, for appellant.

Joy, Hudson, Call & Joy, for appellee.

GRANGER, J.—I. The ground of plaintiff's action is cruel and inhuman treatment. The parties were married in 1872, and have resided at Sioux City for fourteen years before the commencement of this suit. The specific acts constituting the alleged cruel and inhuman treatment are, harsh and abusive language, threats and occasional acts of personal violence. We will not review the testimony at length, nor make extended comments. It abounds with efforts, as is so often true in this class of cases, in attempts to go into the forgiven past to unbury the little incidents that, because experienced and forgiven, should rather sweeten than mar the joys of domestic life, and to magnify their importance through or in the light of the later experiences leading to this attempt at separation.

1. DIVORCE: cruel and inhuman treatment.

An extract from plaintiff's testimony will best indicate the treatment which she claims is such as to endanger her life: "Within the last two years he is somewhat more like a madman than like a sane man at his home. He would come in the house and ask me what I had got to say. I wouldn't speak to him. He would ask me what I had got to say. Would tell him that I had nothing to say except his supper was ready, and that I was glad he had come home to supper, or breakfast, or dinner, or whatever it might be. He said he didn't care a damn about my feelings; that I was lazy, and wasn't good for anything, and I wasn't worth hell-room anyway; that I couldn't be depended upon; that I was crazy; and that he was going to have

me before the commissioners as a candidate for the insane asylum. He was most wild and abusive about a couple of times a week. His conduct, when not at his worst, was ugly and abusive. He would come in and swear at me because dinner wasn't on the table, or so a little thing wasn't done about the house, and he would continually swear and rave. Most of the time he had been drinking, I should say. He seemed to be very excited a great deal, most of the time on account of the stimulants he had taken, I suppose. He would commence abusing me, for instance, by asking what I had for supper, and then he would tell me that I didn't have anything for supper; and I would ask him to come in to breakfast, and he would say I didn't have anything for breakfast; and he would curse and swear because I didn't have anything for breakfast or dinner; and he would put on his hat sometimes and go to the office. When he did not go to the office, he would do a great deal of swearing and making his gestures with his fists at me. Oftentimes I would sit down to the table, and he would be in such a rage that he couldn't sit there to eat himself, nor wouldn't let me, and I would get up to go away, and he would set me down in the chair, and stand right over me, and if I would attempt to get up, as I did a great many times, he would stand with his fists right over me, and rave and swear at me. He pushed me into the chair by taking hold of my arms and shoulders, and seemed to be very violent; very much excited. He said he would fight hell out of me. There was no use for me to say anything. I told him I did not want to say anything. He put his fists against my face and head, sometimes twice a week, sometimes oftener. Every day in the week he curses and raves without me seeing any occasion at all. I only wanted him to be quiet, and try to quiet him, but he insisted on raving and raging. He laid hands on me several times,—many times. He would tell me that I couldn't handle him. Nobody could handle him. Mr. Joy could not handle him. He would fight hell out of Joy, and everybody else. I don't know what else he could do

but quarrel. He would call me a God-damn hellyon, and a God-damn bitch, and said I was a fighter. He called me a son of bitch, and everything of that sort. One Sunday he came home to dinner about four o'clock in the afternoon. I was sitting in the room reading, and he wanted to know what I had got to say because he did not come to dinner. I said, 'Nothing, but your dinner is ready there. on the table.' He said I had no dinner for him, took hold of me, and as I was leaving the sitting-room he followed me into the little hall, pushed me down on the stairs, and kept me there for a long time,—about three-quarters of an hour,—raging and raving over me, calling me names, saying that I could not fight him, and that Joy could not fight him; that he would do what he pleased, come home when he pleased, and go where he pleased. He put his hands against me, straightening me out on the stairs, leaving no marks, but I was lame for a week. He took once hold of me by my shoulders with his two fists up against me, from which I carried the marks for two weeks, without a reason,—just because he was ugly. He often said he would send me to hell. A year ago last summer he took hold of my shoulders, and jammed me right up against the side of the house. I had black and blue marks for a couple of weeks. It left me prostrated so that I was very nervous and weak. One day, while I was arranging the table, he came up and around to me, shook his fist in my face, and said he would fight hell out of me. I told him to be quiet. I started to go in the other room. He took hold of me and throwed me on the bed. I had a dinner knife in my hand, and dropped it, and when he insisted on throwing me as he did, I said: 'I will strike you with the knife if you don't leave me alone;' and in defense I just drew the blood on his hand a very little. He threatened to knock hell out of me if I did not settle down and be a woman. He wanted me to settle down and be a woman. He kept me about an hour on the bed, setting me down every time I would raise. He injured my side by doing so, and broke a slat in the bed. I was lame for three

weeks in the spine and neck, and entirely prostrated. His conduct during nights was cross. He would swear and rave, sometimes two hours. He would ask me if I was asleep, why I did not sit up, why I wasn't awake, or why I wasn't asleep. I used to sit up for him, and he would swear on that account, and said he should stay out nights as long as he pleased, and threatened to knock me into hell if I didn't go to bed and sleep. I used to go out of the house to sleep. He came home so enraged, so crazy, that I was afraid to stay."

It is not, as we understand, and could not well be claimed, but that if the plaintiff's statements, as set out, are true, the treatment of her is so inhuman as to endanger life. With a few exceptions, the statements of the plaintiff as to the conduct of the defendant are expressly denied by him in evidence, and in many instances there is no corroborative evidence for either party. It is true that, for some years past, the domestic life of the parties has been so quarrelsome that, if the sunshine of peace has dawned upon it, the fact has not found its way into the record of this case. A reason for this may be that the zeal for success in the trial has led each party to trace out, and bring to light in the record the faults rather than the virtues of the other. From our examination of the record, we are led to the belief that neither party is alone responsible for this unhappy condition of affairs. Our inquiry is, whether the continuance of the relationship of the parties will endanger her life because of inhuman treatment by the defendant. Any husband who says to his wife, without provocation, as is apparent from the record of this case, that she is "a bitch, a hellyon, a son of a bitch," and names of that sort, is guilty of inhuman treatment. The law in providing for a divorce for inhuman treatment contemplates that human beings may be guilty of inhuman conduct; and such expressions are certainly "cruel and unfeeling," and "destitute of that kindness and tenderness that belong to a human being." Such treatment, however, does not always endanger human life. Much depends upon the organization, the temperament,

of the person subjected to the treatment. Many a wife and mother of refined sensibility, and of a non-combative temperament, thus victimized, would languish and die. Others, less refined, or more combative in temperament, would meet the emergency without danger to life, or even an impairment of health.

If this record stood alone upon the danger to the life of plaintiff, because of the treatment by the defendant in applying to her base epithets, or, added thereto, her complaints as to his general demeanor, including her charge of neglect, we should hold that the conduct was not such as to endanger life. To us the important inquiry is as to his threats and acts of personal violence. Her testimony shows that he has repeatedly assaulted her. This he denies. One assault was surely made when she had a table knife in her hand, but each says the assault was made by the other. As an aid to the truthfulness of these statements, we may look to other incidents in which there is corroboration. We do not find that the defendant, in terms, admits or denies that he made threats of personal violence. It is, perhaps, a fair inference, from his testimony, that he denies them. If admitted, it would go far to substantiate plaintiff's statements as to the violence. If he intends a denial, we think his statement is fairly overcome by the record. It is somewhat significant that, in nearly every instance where their quarrels have been witnessed, her statements have corroboration, The defendant says that in every instance of their quarreling, except one, she commenced it. The girl who worked for them six weeks two years before the trial, and four weeks one year before, in her testimony, leaves little room to doubt that the defendant's statements are not true. During the first period, the defendant was certainly very abusive in language, and quarrelsome, and without any provocation, and she says the second time she was there he was just as bad, if not worse. She says it was an every-day occurrence—sometimes three times a day—"that he swore and cursed; that plaintiff would, to make peace, leave the house until he went

back to the office, and later let him jaw until he got tired." This is a plain contradiction of the testimony of the defendant, and corroborative of the plaintiff, and is of value in settling the questions of conflict in other particulars.

Nellie Walker, a sister of plaintiff, was in the family frequently for the last two years, and testifies that the doctor called his wife bad names, and used profane language almost every day, and says: "Several times, at the dinner table, he got up and stood over her, and cursed her, and said he would send her to hell." She says: "I have seen him pull her round, but I never saw him strike her." This is again corroborative of the plaintiff, and plainly contradicts the defendant.

Mr. Joy, the senior counsel for plaintiff, before the commencement of this suit, was at the house in her interest to procure a settlement of their property affairs, and says: "The doctor spoke to me when he came into the room a few words. Then he went across to Mrs. Douglass, and commenced: 'You damned hellyon, what do you want? Damn you, you are naught.' He shook his fists in her face, and called her a damned hellyon. 'I will send you to hell. I will fix you, damned bitch,' and epithets of that kind." The defendant, in his testimony, admits that he commenced this quarrel, and admits much of the testimony of Mr. Joy; but says he did not call her a bitch, or shake his fists in her face. He says when he quarrels he is in the habit of making gestures with his fists. The difference between gestures with the fists and the shaking of fists, when one is standing over another with such threats, might be difficult to know. We do not, in this connection, lose sight of the provocation that plaintiff was then contemplating this suit, and was seeking to divide the property they possessed, which was of considerable amount, and against the wish of defendant; but the fact is of considerable value in this, that it shows the inclination of the defendant, when under provocation, as to threats and violence, and his conduct on this occasion is in accord

with the testimony of the plaintiff, and some other witnesses, as to his general conduct towards her when in anger, and goes far to support the statements of the plaintiff as to repeated assaults upon her. Both the defendant and Mr. Joy say that at this time the plaintiff was mild; and Mr. Joy says she tried to induce him to be quiet, and that she finally began to cry. The servant girl, whose testimony we have cited, says the plaintiff would say, when defendant was talking: "Doctor, please be still; please be still; don't talk so." And she says: "I can swear I never heard her swear or quarrel."

It is very clearly shown by the evidence that the plaintiff repeatedly fled from the house to the neighbors after the defendant returned home at night; sometimes remaining over night, and at others returning home for the night. The defendant does not deny the facts as to her going, and could not, well, for she is abundantly corroborated by the neighbors; but he denies that his conduct was the cause of it, and claims that it was done for effect. The plaintiff says the doctor often threatened to shoot her, and that he kept a revolver part of the time, which she took from under his pillow, and put in the drawer. We do not understand the plaintiff to mean that the revolver was kept with a view of violence towards her, but only that he had one for protection, and, when in anger, would make such threats; and we attach no other importance to this particular fact.

Our conclusion is that the plaintiff is sustained by the evidence in her statements, as to acts of personal violence by the defendant; and, with that fact found, but one result can follow. The acts of violence are not the results of any deliberative purpose, but of an ungovernable temper, rendered more dangerous in later years by the excessive use of ardent spirits. The defendant is a strong man physically, and the plaintiff by no means of good health, or much physical endurance. It is not for a court to say, in view of such habitual treatment, certainly inhuman, with a man of

such a temper and physical force, and the added uncertainty of what his drinking habit and growing dislike may induce, that the life of the plaintiff is not in danger. If we concede that the plaintiff is meddlesome in her ways, and has done much that would naturally promote domestic discord, there is nothing in her course of conduct that is a justification of the defendant's treatment, or that can furnish him a legal excuse as against her claim for separation.

II. There is a claim of condonation because of cohabitation after commencement of this suit. The claim has no support in the record because of the after conduct of defendant. And, again, admitting the application of the rule to acts of cruelty, it is of very doubtful merit in such cases, unless the court is satisfied that the danger which is the basis for the separation no longer exists. From the very nature of the case, the doctrine should be applied with caution, where the object of the decree is safety to life. 2 Bish. Mar. & Div., secs. 51 and 58.

2. —: condonation.

III. The plaintiff was possessed of property in her own right. There is a conflict of testimony as to the amount of the defendant's property. The plaintiff urges that it is over thirty-seven thousand dollars, and the defendant about twelve thousand dollars, besides indebtedness. It is quite likely the true amount is somewhere between the estimates of the parties; but certainly that of the defendant must be too low. Lot 12 in block 11, east addition to Sioux City, belonged to defendant, and the district court gave to the plaintiff four-sevenths thereof, with two hundred and fifty dollars as attorney's fees. The value of the entire lot is about fifteen thousand dollars. Defendant insists that the allowance is too much. The parties have one son, about sixteen years of age, as to whom the district court made no orders; but reserved the right to do so hereafter, on the application of either party. In view of all the facts, we are not prepared to say the allowance of the district court is not right. It is

3. —: alimony.

not a matter on which different persons, by separate calculations, would be likely to reach the same conclusion as to amount. The judgment of the district court is AFFIRMED.

FRED ANNAKER, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

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1. **Negligence**: EVIDENCE. The plaintiff alleged in his petition that the defendant carelessly and negligently caused the rear end of a freight train, propelled by an engine, to pass rapidly over its tracks while approaching a street crossing, whereby he and his horses and wagon were injured. In support of these allegations, the opinions of witnesses were received in evidence as to the speed of the train at the time, and there was evidence as to the time the train started, the distance it traveled, the force with which it struck the wagon and horses, and the distance it moved after striking them. *Held*, that negligence was sufficiently charged in the petition, and that the evidence was such as to warrant the submission of the question to the jury.

2. ——— : RAILROADS : STREET CROSSING : FLAGMAN. The knowledge of a traveler over a railroad at a street crossing that no flagman is stationed there at such hour, and his dependence, for that reason, upon his own sight and hearing to discover the approach of trains, will not excuse the railroad company for its negligence in not keeping a flagman stationed at the crossing at such hour.

3. ——— : ——— : ——— : ———. Whether the failure of a railway company to keep a flagman on duty at a street crossing in a city, over which its road passes, at a given hour in the day, constitutes negligence, is a question to be determined from a consideration of all the circumstances of the particular case.

4. ——— : ——— : ——— : SIGNALS. The defendant's witnesses testified that signal lights were displayed at the crossing, and the bell on the engine was rung as it approached the same. The plaintiff, on the other hand, testified that he did not see the lights nor hear the bell. *Held*, that if the plaintiff was in a position to hear the bell if rung, and see the lights if displayed, and he was listening and looking for that purpose, there was such a conflict in the testimony as to require the submission of the question to the jury.

5. ——— : INSTRUCTIONS. It is proper for a court to refuse to give an instruction to a jury, which is not applicable to the case under the evidence, though correctly stating a rule of law.

6. ——— : DAMAGES. The plaintiff testified that he had paid a physician named five dollars, while the physician testified that he did not know whether the money received was for services rendered the plaintiff or other members of his family. *Held*, that whether the sum named was paid by plaintiff on account of the injury sustained by him through defendant's negligence, was a question for the jury to decide.

Appeal from Polk District Court. — HON. MARCUS KAVANAGH, Judge.

WEDNESDAY, OCTOBER 22, 1890.

ACTION to recover damages for the alleged negligence of the defendant's employes in backing a train of cars, propelled by an engine, against the plaintiff's wagon and horses at a street crossing, whereby they and the plaintiff were injured. The case was tried to a jury, and a verdict returned in favor of the plaintiff for twenty-one hundred and seventy-five dollars. Defendant's motion for new trial was overruled, and judgment entered on the verdict. The defendant appeals.

Thomas S. Wright and *Cummins & Wright*, for appellant.

Cole, McVey & Clark, for appellee.

GIVEN, J.—I. Appellant's first contention is that the court erred in submitting as an element of negligence the speed of the train, because not charged in the petition, nor included in the statement of the issues made by the court, and because there was no evidence upon which to submit the question. The allegation in the petition is that "the defendant carelessly and negligently caused the rear end of a freight train, propelled by an engine, to approach a street crossing from the east, and then and there to pass rapidly over the south one of the tracks of defendant." In stating the issues, the court followed substantially the language of the petition. The exigencies of the service require that trains of cars be frequently

1. NEGLIGENCE: evidence.

propelled backwards. To say that a train of cars has been so propelled does not charge negligence. Whether to so move a train is negligence must depend upon the circumstances. Omit what is stated as to the speed of the train, and you have no circumstance charging negligence. It would not be negligence for the defendant to cause the rear end of a freight train, propelled by an engine, to approach a street crossing. It is the fact of so approaching it, and passing "rapidly over," that constitutes the negligence charged in this part of the petition. Such being the construction, we hold that the court properly stated the issue.

There were two classes of evidence relating to the speed of the train,—the opinion of the witnesses as to its speed, and evidence as to the time it started, the distance it traveled, and force with which it struck the wagon and horses, and the distance it moved after striking them. Under the state of the pleadings and proofs, it was the duty of the court to submit this question to the jury.

II. The appellant complains of the refusal of the court to give an instruction eliminating from the case the claim of negligence, based upon the absence of a flagman, for the same reasons as urged for withholding from the jury any inquiry as to the speed of the train. It is charged in the petition that the defendant neglected to have a watchman at the street crossing to give warning of the approach of said train. Here again the court followed the language of the petition in stating the issue. It appears without controversy that this accident occurred on the morning of December 26, 1887, a few minutes after six o'clock; that it was a dark, foggy morning; that no watchman or flagman was then on duty at the crossing; that defendant's flagman did not come on duty at that crossing until seven o'clock in the morning; that there was considerable travel over the crossing as early as six o'clock; and that several trains went out from defendant's depot, near by, over said crossing about six o'clock each morning. The plaintiff states that he knew

2. —: railroads: street crossing: flagman.

there was no watchman there at that hour. and appellant's contention is that, as he knew there was no watchman there, and did not depend upon one, but looked for himself, and, by so looking, he could see all that the watchman would have seen, the presence of a watchman would have been no protection; and hence his absence was not the cause of the injury. The protection afforded by the presence of a vigilant watchman at a traveled street crossing is quite different from that afforded by a caution board. The caution board says to the traveler, "Here is a railway track, and you should look out for trains that may move upon it," while the flagman looks for the coming train, and warns the traveler of its approach. The traveler knowing of the presence of a railway may have his view obstructed as he approaches it, but the watchman may go out upon the track, where he can command the most extended view. This case affords an illustration. The testimony shows that there were several tracks along Vine street, running east and west, over which the plaintiff was crossing to the south; that the train was being propelled on the south track; and that there was one or more cars east of the crossing, on one of the northerly tracks, that may have obstructed plaintiff's view of the train, while it would have been in full view of a watchman standing in the middle of the street. It is alleged that no signals were given of the approach of the train by displaying lights, or sounding the bell; hence it is urged that a watchman would not have been aware of its approach any more than the plaintiff was; therefore, the absence of a watchman was not the proximate cause of injury. There is testimony tending to show that this train was passing in accordance with the common custom,— in other words that it was regularly moved in that direction each morning; and, therefore, its approach at that hour would have been, or should have been, known to a watchman. We think there was no error in refusing the defendant's instruction eliminating from the case the claim of negligence, based upon the absence of a watchman.

III. Appellant contends that it was error to leave it to the jury to determine whether, under the circumstances, it was negligence not to have a flagman at the crossing. It is not negligence *per se* for a railway company to omit to keep a flagman at every street or highway crossing, at any given hour of the day or night. Whether such omission is negligence depends upon the circumstances,—such as the frequency with which trains are passing, the amount of travel, the opportunities, or want of opportunities, for travelers observing the approach of trains, and the like. It is clearly a question of fact as to whether the defendant was negligent in not having a flagman at this crossing at the time of this accident, and that question was properly submitted to the jury.

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IV. The appellant makes the further contention, that the court erred in submitting to the jury the issue of signals and lights, because there was no evidence upon which to submit it. A number of witnesses testified that lights were displayed and the bell rung, while the plaintiff testifies that he did not hear the bell. It is contended that this statement does not create a conflict with the evidence of defendant's witnesses that the bell was rung and lights displayed. It is true that for plaintiff to say that he did not hear a bell, or see a light, does not create a conflict with one who says he did; but, if it appears that the plaintiff was in position to hear the bell if rung, and see the lights if displayed, and that he was listening and looking for that purpose, then there is a conflict. There was testimony tending to show that even though lights were displayed, as testified to by the defendant's witnesses, yet that there were intervening obstacles that would have prevented the plaintiff from seeing them from his position in crossing the track. Under the state of the testimony, there was no error in submitting this issue to the jury.

4. —: —: —: signals.

V. The defendant asked an instruction as follows: "In the consideration of the evidence of equally credible

witnesses, affirmative testimony, as that a bell was rung, is entitled to more weight than negative testimony, as that a bell or whistle was not heard." Appellant complains of the refusal to give this instruction. That it clearly states the law cannot be questioned, and would be applicable where the negative testimony was simply as stated,—that is, that a bell or whistle was not heard,—but not applicable where they were listened for within hearing distance, and not heard. The attention of the jury was sufficiently directed to this matter in the third paragraph of the charge, as to how they were to weigh the testimony, and especially in the direction that they were to consider the witness' means of knowledge concerning the facts about which he testified.

5. —: instructions.

VI. The only remaining error assigned and urged in argument is, that the court erred in submitting to the jury, as an element of damage, the claim for medical expenses, because there was no evidence that plaintiff incurred any such expense on account of the accident. Appellant testified to paying Dr. Priestley five dollars, while Dr. Priestley testified that he did not know whether the items were for services rendered to plaintiff, or to some other members of his family. It was a question under the testimony whether the five dollars paid to Dr. Priestley was on account of plaintiff's injury or not, and that was a question for the jury.

6. —: damages.

Our conclusion is that the judgment of the district court should be AFFIRMED.

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JOSEPH GRAVEL, Appellant, v. H. H. CLOUGH *et al.*, Appellees.

1. **Conversion of Chattels by Mortgagee: DAMAGES.** The measure of damages recoverable for the conversion of mortgaged chattels by a wrongful sale thereof by the mortgagee is the difference between the price for which the property sold and the market value thereof on the date of such sale.

2. **Costs.** Where issue is taken upon the demands of the plaintiff in a cause, and he recovers in part, and the defendant is partially successful upon a counterclaim therein, the costs of the suit should be equitably apportioned between them.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 23, 1890.

ON the eighth day of July, 1886, the plaintiff purchased of the defendant one hundred and forty-two head of cattle, and gave therefor his two notes for twenty-nine hundred and nineteen dollars and sixty-five cents each, due respectively, February 8 and July 8, 1887; and on the ninth of December he executed to the defendant a mortgage on said cattle to secure the payment of said notes. On the eighth of December, 1886, the plaintiff made to the defendant his note for twelve hundred dollars, and, on the day following, the plaintiff made two other chattel mortgages to secure the twelve-hundred-dollar note, one being on one hundred and seventy-five tons of hay in Monona county, and the other on certain stock, farm machinery, etc., in Woodbury county; and on the fourteenth day of December, 1886, he made another mortgage on certain horses, the same being junior to a mortgage to Chapin Bros. These mortgages were known in the record as follows: That on the cattle as "Exhibit A;" those on the hay and on the corn, stock, etc., in Woodbury county as "Exhibit B;" and that on the horses as "Exhibit C." Exhibits B and C, besides securing the twelve-hundred-dollar note by their terms, are additional security for the two notes given for the cattle. The consideration of the twelve-hundred-dollar note is somewhat in dispute, but it is undisputed that a part of the consideration therefor was an agreement by the defendant to furnish corn and feed for the cattle before mentioned. No part of the consideration for the twelve-hundred-dollar note having been paid, it was, by agreement, on the twentieth of December, 1886, surrendered to plaintiff.

Each of the mortgages contained the usual clause that, "whenever the mortgagee shall deem himself unsafe, then, and in that case, it shall be lawful for such mortgagee * * * to take immediate possession of said cattle, * * * and to sell the same at public auction," etc. Under the provisions of the mortgage, and on the fifth day of January, 1887, the defendant firm took possession of the cattle, and on the twenty-fifth of January, 1887, sold them at public auction for five thousand and forty-one dollars, and after deducting four hundred and sixty-four dollars as the costs of sale, feeding, etc., indorsed the balance, forty-five hundred and fifty-seven dollars, on the notes given for the cattle, leaving a balance of said notes still unpaid. Thereafter, on the seventh of March, 1887, by virtue of Exhibits B and C, the defendant took possession of a part of the property described therein, and sold the same at public auction, and realized therefrom, exclusive of expenses, four hundred and two dollars and four cents, which was applied on the notes.

The plaintiff avers that, when the note for twelve hundred dollars was given, it was verbally agreed that defendant should furnish corn for plaintiff in such quantities as he should need to feed the cattle till May or June, 1887, for the market price at the time of delivery, and also furnish a carload of hogs or more to run with the cattle at the market price thereof, which it failed to do. Plaintiff also avers that, when Exhibit C was made, the only consideration therefor was the agreement by the defendant to furnish the corn and hogs, and to extend the time of payment of the first note given for the cattle, and that, when the twelve-hundred-dollar note was tendered back by defendant and accepted, it was with the understanding that the two mortgages given to secure it should be canceled of record, which defendant failed to do.

The plaintiff alleges that the seizure and sale of the cattle before the maturity of either of the notes secured thereby, and of the property described in Exhibits B and C, after the surrender of the twelve-hundred-dollar

note, was wrongful; and this action is to recover damages for such wrongful acts, and the conversion of the property. Barring the facts stated, the defendant puts in issue the allegations of the plaintiff as to his right to recover. The district court found that the sale of cattle, January 25, and of other property, March 22, 1887, was premature and wrongful, and adjudged the plaintiff entitled to a credit on the notes for the market value of the cattle on the date of the sale, fixing the value at five thousand and forty-seven dollars and fifty-one cents, and also for the value of the property sold in Exhibit C of the date of such sale, fixing the value at five hundred dollars, and found a balance due on the notes for seven hundred and eight dollars and ninety-three cents, for which, on defendant's counterclaim, it gave judgment. From such judgment the plaintiff appeals.

J. P. Blood, for appellant.

J. H. & C. M. Swan and *W. D. Buckley*, for appellee.

GRANGER, J.—I. Upon the issues of fact presented as to an agreement to furnish corn and hogs, and a failure so to do, and to cancel the mortgages Exhibits B and C with the surrender of the note for twelve hundred dollars, the district court found with the defendant, and we think rightly; for an examination of the testimony leaves little room for doubt as to such facts, and we will not produce or discuss the evidence leading to the conclusion.

1. CONVERSION of chattels by mortgagee: damages.

The debatable question, if any in the case, is the measure of damages. The district court held the sales wrongful, and adopted, as the rule of damage, the value of the property at the time of the sale. Appellant urges that the measure of damage is the highest market value between the time of the conversion and suit brought, and the claim is not without strong support on authority, if we say with appellant that the rule applicable to sales of personal property, where the price is

paid, and there is a failure to deliver, is applicable to this case. The rule of damage in cases of sales of property, and a failure to deliver, is differently applied in the United States. We might be disposed to consider the importance and correctness of the different rules but for the fact that this court has held to a rule in a case, which, on principle, we think, should govern in this. In *Brown v. Allen*, 35 Iowa, 306, the question arose as to the measure of damage for wrongfully entering a warehouse and removing corn. It is true, the claim there was not like appellant's claim here, but it involved the right of plaintiff to obtain more than the market value at the time of the conversion. The plaintiff in that case offered to show, as affecting his damage, that he had an outstanding contract for the corn in excess of the market value, which offer was refused, and this court held to the rule of the market value at the time of conversion. That is certainly a strong case, in its facts, for an extension of the rule, but this court said: "The market value is the measure of damage." There is certainly no reason for holding to such a rule in that case, and a different one in this. The taking of the property into possession in this case was not wrongful. The wrongful act consisted in selling before the maturity of the notes. At least, the district court held such selling wrongful, and as appellee does not, in argument on appeal, question the correctness of the holding, but indicates a willingness that the cause should be disposed of on that theory, we treat it as a fact, and consider the case accordingly. Adopting, as applicable to the facts of this case, the rule in that, the market value of the property at the time of sale is a correct one, and the judgment to that extent must be approved.

II. The district court taxed the costs to plaintiff. Defendant, by way of counterclaim in the action, sought judgment on its notes for the unpaid balance, and obtained it. The judgment, however, is for less than appeared to be due thereon after applying the proceeds of the sale by some five hundred and sixty-eight dollars and forty-seven cents, and

2. COSTS.

in legal contemplation such reduction is equivalent to a recovery of that amount, and it does not appear from the record that plaintiff could secure such right, except by suit, as the right is clearly put in issue by defendant. It is true that part of the controversy involving cost, is upon issues determined favorable to the defendant. There should be an apportionment of the costs in the district court, and, as the record before us is not such as to enable us to properly determine the amount, it will be left to the discretion of that court. The costs of this appeal will be paid by the plaintiff. With the exception as to costs, the judgment of the district court is

AFFIRMED.

CHARLES AUSTIN, Appellee, v. BOWMAN BROS. & BURR *et al.*, Appellants.

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1. **Judgment**: LIEN: INJUNCTION. Pending an action to foreclose a mortgage upon certain real estate, the defendants obtained a judgment against one of the owners thereof. After decree in the foreclosure proceeding, the property was sold on special execution, and a sheriff's deed in due time was issued to the assignee of the holder of the certificate of sale. *Held*, that the mortgage being a prior and paramount lien the foreclosure and sale thereunder operated to pass the title to said property to said purchaser clear of the lien of defendants' judgment, and defendants were properly enjoined from seeking to enforce the same against the property on execution.

2. ——: ——: FRAUD: EVIDENCE. The fact that said certificate of sale was purchased by the father-in-law of the judgment debtor, who subsequently conveyed the property to the debtor's wife, while casting some suspicion on the transaction, is not sufficient to show that such purchase was fraudulent, and in fact a redemption of the land with the debtor's money, against the direct and positive testimony of the debtor in support of the good faith of the transaction.

3. ——: ——: ——: ——. The fact that a purchaser of the property from such debtor's wife took security against the lien of defendant's judgment, and other clouds upon the title, is no proof of fraud, nor will equity require him to abandon his title to the property, and seek to recover upon his security.

Appeal from Butler District Court.—HON. JOHN C. SHERWIN, Judge.

THURSDAY, OCTOBER 23, 1890.

ACTION in chancery to restrain the sale upon execution of lands of plaintiff. Upon a trial on the merits, the relief prayed for by plaintiff was granted. The defendants appeal.

E. L. Smalley, for appellants.

Gibson & Dawson, for appellee.

BECK, J.—I. The defendants seek to enforce a judgment in their favor against Phineas Weed and J. D. Powers, rendered June 9, 1879, by the sale, on an execution issued thereon, of lands owned by plaintiff. At the date of this judgment the land was owned by Phineas Weed and W. P. Weed. May 14, 1881, Phineas Weed conveyed his interest in the land to W. P. Weed, who, October 28, 1887, conveyed the land to plaintiff. The judgment is claimed to be a lien upon the interest in land held by Phineas Weed on the day it was rendered. The grantor of the Weeds, under whom they acquired the title, before the conveyance to them, executed a mortgage on the land to Ellen Brett, upon which an action to foreclose was commenced June 5, 1879, before defendant's judgment was rendered. The decree of foreclosure was rendered afterwards. The lands were sold upon special execution issued upon this decree of foreclosure to Mrs. Brett, and a certificate of the sale was made to her. January 24, 1882, the certificate was assigned by Mrs. Brett to John and Nancy Scolby, the parents of the wife of Phineas Weed, and about a month afterwards a sheriff's deed for the land was made to them, which was filed for record, April 4, 1888, after the action was commenced. In 1887, Nancy Scolby conveyed the land by quitclaim to P. S. Weed,

1 JUDGMENT: lien: injunction.

the wife of Phineas, who, with his wife, after this action was begun, conveyed the land by quitclaim deed to plaintiff.

II. It will be observed that the mortgage is prior and paramount to defendant's judgment, and that plaintiff has acquired whatever title and interest was held by Nancy Scolby, under the foreclosure and sheriff's deed. There can be no question as to the validity of her title to her interest, whatever that may have been. The remainder of the interest in the land, if she does not hold all of it, is in the estate of her deceased husband, and stands, as to defendant's judgment, in the same condition as her interest. If that judgment is not a lien on the land to the extent of her interest, it does not bind the interest of the husband's estate, whatever that may be.

III. Upon the facts stated thus far in our consideration of the case, defendant's judgment cannot be held to be a lien upon the land. The mortgage, being a prior and paramount lien, would, in its enforcement by foreclosure, pass the title to the land free from defendant's judgment. But defendants insist that the Scolbys in fact redeemed the land from the foreclosure sale, acting fraudulently in that regard, to cover and protect the land from defendant's judgment.

2. —: —: fraud: evidence.

IV. But in our judgment the preponderance of the evidence supports the view that the money to purchase the certificate of sale was not the money of Weed, but was the money of Scolby, and the transaction was in good faith, and not to defeat defendant's judgment. Weed could not raise the money to redeem from the sheriff's sale. His wife's father purchased the certificate with his own money. The relations existing between Weed and the Scolbys, and some other circumstances, cast some suspicion on the transaction; but they are not sufficient to overcome the positive, direct and clear testimony of Weed in support of the good faith of the transaction, and to the effect that the purchase of the certificate was made wholly with the money of Scolby.

V. The evidence does not raise any suspicion of the good faith of plaintiff. It is claimed that he took security against defendant's judgment. He states that he noticed defects in the title, and other judgments, and took the security to protect him against all of them. There is nothing fraudulent or illegal in this. Nor will equity require him to abandon his valid title to the land, and seek to recover on his security. It is our conclusion that the judgment of the district court ought to be AFFIRMED.

8. THE same.

B. F. FISH, Appellee, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

1. **Railroads**: NEGLIGENCE: FIRE: EVIDENCE. Where the question of title to real property is only incidentally involved in a cause. parol evidence of such fact will, in the absence of any objection thereto, be regarded as competent, and its competency cannot be questioned for the first time on a motion by the opposite party for an instruction to the jury to return a verdict in its favor.

2. ———: ———: ———: INSTRUCTIONS TO JURY. An instruction that certain evidence is insufficient to establish a fact in issue may be properly refused when such evidence, taken in connection with other evidence in the case, tends to prove such fact, and the instruction is calculated to mislead the jury.

3. ———: ———: ———: ———. A judgment will not be reversed by the supreme court because a single paragraph of the trial court's charge to the jury, when taken alone, is susceptible to the interpretion of an erroneous statement of the law, when the language of such paragraph is elsewhere properly modified and explained, and the charge taken as a whole correctly presents the law to the jury.

4. ———: ———: ERRORS NOT OBJECTED TO: APPEAL. Errors of the trial court to which no objection was made at the time, nor made the ground for a motion for a new trial, but are raised for the first time upon appeal, will not be considered by the supreme court.

Appeal from Mahaska District Court.—HON. D. RYAN, Judge.

THURSDAY, OCTOBER 23, 1890.

ACTION to recover damages from a fire alleged to have been wrongfully caused by defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Seevers & Seevers, for appellant.

H. H. Sheriff and *Bolton & McCoy*, for appellee.

ROBINSON, J.—The fire in question was set out on the twenty-first day of July, 1886, and it is alleged destroyed a dwelling-house and grass and hay belonging to plaintiff of the value of six hundred and sixty dollars. It is the theory of the plaintiff that the fire was negligently set by a locomotive engine of defendant on its right of way; that defendant had negligently permitted rubbish, ties and other timber to accumulate on its right of way; that the material so left on the right of way was burned, and that fire therefrom was carried by a high wind a distance of five hundred and twenty-one feet to the dwelling-house, and that in consequence the dwelling-house was destroyed. The answer admits that defendant is a corporation operating a railway. It further states that, "As to whether defendant's railway passes along and through any farm of plaintiff situated on the line of defendant's railway; as to whether the dwelling-house belonging to plaintiff was destroyed by fire; as to whether any hay or grain belonging to plaintiff was destroyed, defendant has not knowledge nor information sufficient to form a belief. Defendant denies each and every other allegation in said petition contained." The verdict of the jury was for six hundred and ninety-four dollars and fifty cents including interest, and judgment was rendered for that amount.

I. Appellant contends that the evidence fails to show that the dwelling-house destroyed belonged to plaintiff. There is some ground for the claim of the appellee that the answer admits that plaintiff was the owner of the

1. RAILROADS: negligence: fire: evidence.

house. It is referred to as "the dwelling-house belonging to plaintiff," and the denial is not general, but refers to matters not otherwise answered. There was parol evidence to the effect that plaintiff owned the house, given without objection. It is apparent that the question of title was not treated as in dispute. It is true, as a general rule, that the title to real estate cannot be proven by parol if objections be made. *State v. Birmingham*, 74 Iowa, 409. But it is a very common practice to receive such proof as competent when no objection is made, especially in cases when the question of title is not a vital issue, and is only incidentally involved. We discover no objection to the practice, but think it commendable as tending to economize time and abbreviate the record. Defendant made no objection to the evidence in question until all the evidence in the case had been submitted. It then asked the court to instruct the jury to return a verdict in its favor, on the ground that the evidence was insufficient to authorize a verdict for plaintiff. If it be conceded that the request then made raised the question as to the competency of the evidence as to title, we are of the opinion that it was raised too late. *Ham v. Railway Co.*, 61 Iowa, 717; *Saunders v. Mullen*, 66 Iowa, 729; *Becker v. Becker*, 45 Iowa, 240.

II. The court refused to give an instruction asked by defendant in language as follows: "The fact that defendant set out a fire upon its right of way, "if it did set out a fire there, is not evidence that such fire communicated itself to and burned the house of plaintiff, if it be plaintiff's house, but before you can find for plaintiff the plaintiff must satisfy you by the facts and evidence in the case that such fire did communicate to and burn said house, and you cannot so find by mere inference or guess, nor by any theory or arguments of plaintiff's counsel, unless such theory and argument be supported by the facts and evidence in the case."

2. —: —: —: Instructions to jury.

We think the first part of the instruction was not strictly accurate, and that it was calculated to mislead

the jury. The fact that the fire was set upon its right of way by defendant would not be sufficient evidence to show that such fire was communicated to and burned the house, but when considered with other facts disclosed by the record, it was properly treated as evidence tending to establish the disputed fact. So far as the instruction expressed the law of the case it was given in other instructions.

III. The sixth paragraph of the charge, after referring to the distance of the engine of the defendant, and the rubbish pile which was fired, from the dwelling destroyed, is as follows: "I invite your careful consideration to the evidence upon the alleged cause of fire. You may take into consideration the relation of the fire and the building, whether or not the wind was blowing, and its velocity; the time when the house was discovered to be on fire, as compared with the time of the passing of the engine of defendant, or the time when the rubbish was discovered to be on fire, the velocity with which the rubbish burned, and to this evidence you may apply your common sense, observation and candid and careful judgment as to the probability or possibility of the fire being caused from sparks communicated in this manner."

8. THE same.

It is difficult to say just what the court intended by the language used. The appellant contends that its effect is to charge the jury that to render defendant liable it is only necessary to prove that it was possible that the fire set by defendant on its right of way caused the destruction of the building. If the language used were not elsewhere explained or modified we should be constrained to hold that the paragraph quoted would be liable to be interpreted by the jury as appellant claims it should be interpreted. In that case there would have been reversible error, for it is not true that defendant can be held liable by showing that it was possible only for it to have caused the loss of the building in question. But the paragraph quoted was necessarily so far modified and controlled by two instructions given at the

request of defendant that it could have had no prejudicial effect of the nature contended for by appellant. The instructions referred to are as follows: "6. The plaintiff must not only satisfy you from the evidence that the defendant set out the fire, but plaintiff must also satisfy you by the evidence that such fire was communicated to the house. This must be shown by evidence; you cannot arrive at such fact by inference or guess, but such fact must be shown by the facts proved in the case.

"7. It is not sufficient for the plaintiff to show merely that the house might have caught fire from the fire set out by defendant, if the defendant did set it out, unless the facts relied upon to prove such fact are of such a nature, and so related to each other, that it is a conclusion that can be fairly or reasonably drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true and yet they may not prove the theory."

We think these instructions fully meet the objections made by appellant to the sixth paragraph of the charge, and that the jury could not have been misled by it. The charge must be considered as a whole, and when so considered it does not leave the question raised by appellant in doubt.

IV. Appellant asked two instructions, numbered 6. The bill of exceptions shows that one was given, and the other refused. On the margin of the one refused was written the following: "Refused." Defendant excepts, D. RYAN, Judge," but the margin of the other was left blank. Appellant insists that the court erred in not marking it either "Given" or "Refused." We do not find it necessary to determine the question thus presented. The failure to mark the instruction in question as given was evidently an oversight, possibly due to the fact that two of those asked by defendant bore the same number. But the alleged error was not objected to when the instruction was given, nor was it made a ground of the motion for a new trial. So far as we are advised the attention of

4. —: —: errors not objected to: appeal.

the district court was never called to it, and it is urged in this court for the first time. We think the objection is made too late to be determined on its merits.

What we have said disposes of the controlling questions in the case. The judgment of the district court is AFFIRMED.

SAMUEL HIBBS, Appellant, v. THE WESTERN LAND COMPANY *et al.*, Appellees.

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Injunction: ACTION ON BOND: PLEADING. A petition in an action for damages on an injunction bond alleged that the defendant caused an injunction to be issued restraining plaintiff from trespassing on certain real estate: that plaintiff was put to great trouble and expense in defending against the wrongful issuance of said injunction, and in obtaining its dissolution, including an attorney's fee of fifty dollars, and twenty days of his own time; but not stating upon what ground the injunction was issued, nor upon what ground it was dissolved, nor that plaintiff was thereby prevented from the exercise and enjoyment of some substantial right to which he was entitled, is bad on demurrer.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

THURSDAY, OCTOBER 23, 1890.

THIS is an action on an injunction bond. There was a demurrer to the petition, which was sustained, and the plaintiff appeals.

D. D. McCallum, for appellant.

John S. Monk, for appellees.

ROTHROCK, C. J.—The averments of the petition are, in substance, as follows: That the Western Land Company brought suit against Hibbs, the plaintiff herein, in which a writ of injunction was issued restraining the defendant from trespassing on certain real estate; that said Hibbs employed an attorney to file a

motion to dissolve the injunction, and to make proper defense to said action; that a motion to dissolve the injunction and an answer were filed, and the injunction was dissolved; that defendant was put to great trouble and expense in defending against the wrongful issuance of said injunction, and paid an attorney fifty dollars therefor, and was twenty days engaged in defending said wrongful issuance of said writ; that the condition of the injunction bond has been broken, and judgment is demanded upon said bond for one hundred and ten dollars. The demurrer, among other grounds, raises the objection to the petition that it fails to show that plaintiff sustained any damage by reason of said injunction, or that there was any occasion to incur any expense to procure its dissolution. It will be observed that the averments of the petition are very general in their terms. It does not appear upon what grounds the plaintiff was enjoined from trespassing upon the land, nor upon what grounds the injunction was dissolved, nor what was in issue between the parties touching the land, nor whether the plaintiff herein was deprived of any substantial right by being enjoined from trespassing on the land. It was held in the case of *Bank of Monroe v. Gifford*, 70 Iowa, 580, that, in order to recover damages upon an injunction bond, it is necessary that it should appear that the plaintiff was prevented by the injunction from exercising or enjoying some right or privilege which he desired to exercise, and which he was entitled to enjoy. If the injunction in this case deprived the plaintiff herein of any right, or restrained him from taking possession of land to the possession of which he had the right, and the possession was of some value, we think he might maintain an action on the bond. The condition of an injunction bond is that the obligors will pay the damages sustained by reason of the injunction. The gist of the action is the damages sustained by being deprived of some right. The petition does not contain any averment that such damages were sustained, and we think the district court correctly sustained the demurrer. AFFIRMED.

OLIVER & MILLER, Appellees, v. S. T. DAVIS *et al.*, Appellants.

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1. **Mechanic's Lien:** ORIGINAL NOTICE: PETITION. Where the original notice in a cause is served by publication, the failure to file the petition until after the time stated in the notice will not invalidate the service thereof if the filing of the petition precedes the first publication of the notice.

2. ——: LEASEHOLD INTEREST IN LAND: FORFEITURE. Under an agreement for the lease of a vacant city lot providing that, in case of default in the payments to be made by the lessee, the lessor might consider the agreement at an end, and the premises and all the improvements made thereon shall thereupon revest in the lessor, one who, with notice of such agreement, supplies the lessee during his term with materials for the erection of a dwelling-house upon the leased premises will, in the event of a forfeiture under said agreement, be entitled to a mechanic's lien upon such dwelling as against the lessor or his grantees.

3. **Practice in Supreme Court.** Errors which are only indefinitely suggested by counsel upon appeal will not be considered by the supreme court.

Appeal from Woodbury District Court.—HON. GEO. W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 23, 1890.

ACTION in equity to establish and enforce a mechanic's lien. There was a trial upon the merits, and a decree in favor of plaintiffs. The defendant, S. T. Davis, appeals.

J. P. Blood, for appellants.

Marks & Mould, for appellees.

ROBINSON, J.—On the twenty-ninth day of April, 1884, the defendant, S. T. Davis, entered into an agreement in writing with his codefendant, G. S. Martin, for

the sale of lot 5, in block 32, in Davis' addition to Sioux City. Martin paid ten dollars on the agreement, and made and delivered to Davis his five notes for forty-eight dollars, each payable in monthly installments of four dollars each. Davis gave to Martin a bond for a deed which provided that time should be of the essence of the agreement, and that in case of default in the payments to be made by the terms of the agreement, or in any of them, the obligor might elect to consider the agreement at an end, and that in such case the obligee should be considered a tenant at will holding over after the termination of his lease, and should forfeit all payments and improvements made, and the premises should revert to and revest in the obligor. The bond also contained a provision as follows: "And it is expressly agreed that under this agreement the interest of the obligee in said premises shall be only a leasehold interest until deed is made thereunder, and shall not be subject to any mechanic's lien or other lien by reason of any act of said obligee." The first payment provided for by the agreement, after the first one of ten dollars, was due on the twenty-ninth day of May, 1884, but was never paid, and no further payments have been made. On the thirtieth day of June, 1885, plaintiff made a verbal agreement with Martin to furnish certain lumber, and other material for use in the construction of a dwelling-house on the lot in question, and the material so contracted for was delivered on the lot during that day and the day next following. At the date of the trial in the district court there was due and unpaid on account of such material the sum of one hundred and thirty-eight dollars and fifty-eight cents. Martin absconded before the building was completed, and the plaintiffs took possession and removed the material not used, which they had delivered, and on the seventeenth day of July, 1885, filed a statement for a mechanic's lien for the amount due. On the fourteenth day of July, 1885, Davis took from Martin a bill of sale of the building for the purpose of securing a loan of one hundred dollars, on condition that the sale should be absolute if the

loan was not repaid within thirty days. After Martin left, Davis entered on his books a declaration of forfeiture of the agreement to convey. In June, 1886, Davis sold the house and lot to one Koser, and gave him a bond for a deed. He now contends that plaintiffs acquired no right to a mechanic's lien which they can now enforce against the lot or the building. The district court established the lien of plaintiffs against the dwelling for the amount found to be due and costs, subject, however, to such rights in Koser and wife as might thereafter be found to be paramount to the lien of plaintiffs, and the cause was continued for the purpose of bringing Koser and wife into court.

I. The defendant Martin was served with the original notice of this action by publication. The first publication was made on the fifth day of May, 1887. The notice stated that the petition would be filed on or before the twenty-seventh day of April, 1887, but it was not in fact filed until the twenty-eighth day of that month. Martin did not appear to the action. The court found that he had been duly served with notice, and adjudged him in default. Appellant insists that the serving of notice was insufficient to give the court jurisdiction to enter a default against Martin, and that the case should have been treated as dismissed as to Martin under the provisions of section 2600 of the Code. The petition was on file, however, before the first publication of the notice, and the case is thus brought within the rule announced in *Smith v. Shaw*, 49 Iowa, 294, where service in such cases after the petition was in fact filed was held to be sufficient.

1. MECHANIC'S LIEN: original notice: petition.

II. It is claimed by appellant that the plaintiffs could acquire no right to a mechanic's lien as against Davis and his grantees, for the reason that the agreement of sale prohibited it, and provided that in case of an election to terminate the agreement the improvements placed upon the lot were to be forfeited to Davis. There was a

2. ——: leasehold interest in land: forfeiture.

default in payment and an election to cancel the agreement, and we are required to determine their effect upon the interest of plaintiffs. The statute provides that every person who shall furnish materials for any building or other improvement upon land, by virtue of a contract with the owner, shall have a lien upon such building or other improvement, and upon the land belonging to the owner upon which it is situated. Acts of 16th Gen. Assem., ch. 100, sec. 3. Section 10 of that act provides that every person for whose immediate use or benefit such building or other improvement is made, having the capacity to contract, shall be included in the word "owner" thereof, and section 4 provides for the case of an owner who has only a leasehold interest in the land. The agreement in question did not prohibit the making of improvements, but evidently contemplated that they might be made. It provides that the interest of Martin should be a leasehold interest until the deed should be made. It thus appears that the interest of Martin in the lot was sufficient to support a mechanic's lien in favor of the plaintiffs, unless the provision in the agreement that it should not be subject to any mechanic's lien had the effect to prevent it.

It may be conceded for the purposes of this case that the plaintiffs were bound to take notice of the actual interest which Martin held in the land, and of the limitation upon his power to make contracts for improvements which would entitle them to a lien. It was the right of Davis to contract for the sale of the lot on such conditions as would secure the payment therefor, and prevent the placing of incumbrances thereon until the purchase price should be paid. What was the purpose of the agreement in question? Certainly not to prevent the making of improvements. In terms it created a leasehold interest. Section 4 of the Acts of the Sixteenth General Assembly, already referred to, provides for establishing liens on improvements on land held by the owner under a lease, and expressly provides that the lien shall not be impaired by a forfeiture of the lease "for the non-payment of rent or for non-compliance

with any of the other stipulations therein," so far as the lien concerns the improvements. Improvements thus made could be forfeited by the lessee only so far as they belong to him, and if they were subject to a valid lien the forfeiture would not affect the lien. The purpose of the provision of the agreement under consideration in regard to forfeiture and liens was, undoubtedly, to secure the performance of the agreement on the part of the obligee, and to secure the obligor against loss in case of a failure to perform. In view of the statute and the language of the agreement we conclude, that the interest contemplated by the provision against liens is that created by the agreement, and that it does not include improvements which the obligee should make. This view is strengthened by the fact that the dwelling in question was built upon blocks, and that it was treated as distinct from, and not a part of, the lot by the parties to the agreement in the giving of the bill of sale. We conclude that plaintiffs are entitled to a lien against the dwelling. Whether the parties could have so contracted as to prevent the establishing of a mechanic's lien as against the improvements is a question we do not find it necessary to determine.

III. Appellant suggests defects in the affidavit for publication of the original notice and in the statement for a mechanic's lien, but does not point them out. It is not our custom in cases of this kind to search for errors which counsel do not specify. Our examination of the record leads to the conclusion that the decree of the district court is in harmony with the law and the evidence. There is no ground for complaining of the continuance of the case for the purpose of bringing Koser and wife into court that their interests might be settled.

3. PRACTICE in supreme court.

The decree of the court below is AFFIRMED.

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THE ESTATE of JOHN HOFFMAN, Appellee, v. NICHOLAS HOFFMAN *et al.*, Appellants.

1. **Conveyance**: DESCRIPTION OF PROPERTY: CONSTRUCTION. A conveyance of real estate, made by a widow woman to her son, just preceding her death, contained this clause: "And also one-half of all personal property, of every name or nature, attached to the above real estate." *Held*, that, in view of the facts and circumstances surrounding the parties at the time of the transfer, the deed was to be construed as referring to all the personal property upon the real estate described, and not simply to such as is designated by law as fixtures.

2. — —: DELIVERY: EVIDENCE. The notary who drew the above deed testified that he delivered the same to the grantee, but on cross-examination stated, that the deed was left with some notes in his possession, with the understanding that he should hold them, so that in case the grantor should recover "she could have the property if she liked," and that there was to be no delivery of the deed until she died. On redirect examination the witness stated that he did not recollect that the grantor said anything to him about holding the deed, but that he had held the same at the request of the grantee. *Held*, that, this being a proceeding in probate, the finding of the district court that there was a delivery of the deed has the force of a verdict of a jury, and the same would not be disturbed.

3. ———: PERSONAL PROPERTY: ADMINISTRATION. A transfer of personal property in contemplation of one's approaching decease will not be disturbed in the absence of any showing that there are debts due from the estate of the grantor.

Appeal from Dubuque District Court.—HON. D. J. LENEHAN, Judge.

THURSDAY, OCTOBER 23, 1890.

ON the twenty-first day of April, 1888, Mathias Hoffman was appointed administrator of the estate of John Hoffman, deceased. On the sixteenth day of May, 1889, said administrator filed his final report. The defendants, claiming to be the heirs at law of John Hoffman, filed exceptions to said report. A trial was had by the court, and the exceptions were overruled, and the report confirmed. Defendants appeal.

J. C. Longueville, for appellants.

J. D. Alsop and *Adams & Mathews*, for appellee.

ROTHROCK, C. J.—I. John Hoffman, at the time of his death, was the owner of the undivided half of a farm, and of the horses, cattle, hogs and farming utensils on said farm. Mathias Hoffman, his brother, was the owner of the other undivided half of said property. John Hoffman was unmarried, and his mother, Margaret Hoffman, inherited his estate. It is claimed by Mathias Hoffman that after the death of his brother, by an arrangement with Margaret Hoffman, she conveyed and transferred to him the interest in the property which she inherited from her son, John Hoffman. The administrator's report sets forth this fact, and it is claimed therein that the personal property above mentioned is the property of Mathias Hoffman. Margaret Hoffman died after making the alleged transfer of her property, and the exceptions to the report of the administrator are taken by her administrator, and by the brothers and sisters of John Hoffman.

1. CONVEYANCE: description of property: construction.

It appears in evidence that, on the fourteenth day of April, 1888, Margaret Hoffman made a conveyance of the land to Mathias Hoffman. After the description of the land in the deed there is this clause: "And also one-half of all personal property, of every name or nature, attached to the above real estate." It is claimed in behalf of appellants that this did not convey the live stock and farming utensils and other property, because they were not attached to the real estate. In other words, it is insisted that only such property was conveyed as the law designates as "fixtures." The facts and circumstances surrounding the parties at the time the transfer was made make it very plain that the intention was to transfer the personal property which was on the farm. The word "attached" was not used in any technical sense. If there was, in fact, a transfer of

anything, it included all the real and personal property of the deceased.

II. The only real question in the case is, was the deed a completed transaction between the parties so as to pass the title to the property? This depends upon the fact whether there was such a delivery of the deed as to pass the title, and a determination of this question of fact settles the rights of the parties. The deed and other papers were prepared by one Philip Heles. He was a notary public, and took the acknowledgment to the deed. He was examined as a witness upon the trial, and he gave the following testimony on his examination in chief: "I reside in Liberty township, where I was born. Was acquainted with John and Margaret Hoffman during their lifetime. Margaret Hoffman lived with Mathias Hoffman when she died. Remember being sent for by Margaret Hoffman, in April, 1888. Mathias Hoffman came after me to do some writing for his mother, Margaret Hoffman. I went there, and saw her. She said she would like to dispose of all her property; that she was sick, and didn't know how long she would live, and wanted to get things straightened up. She told the different sums to set out to the different children, and all the balance to Mathias. The property consisted of real and personal property. It was cattle, horses and general personal property on the farm. This personal property was on the farm occupied by Mathias Hoffman then, and had been owned by him and John before John's death. She said: 'I want to give five hundred dollars to Barbara Hoffman, and two hundred dollars to Nicholas Hoffman, and fifty dollars apiece to the two girls, fifty dollars to Margaret Tilchen, and fifty dollars to Elizabeth Eischen, fifty dollars for saying mass at my death, and fifty dollars for saying mass for John, and all the balance to Mathias.' The money for saying mass was to be paid to the priest. These sums were to be paid in notes given by Mathias Hoffman. She was to give the farm to Mathias Hoffman to deed the undivided one-half. I made a deed of

2. ——: delivery: evidence.

the farm. That deed was delivered to Mathias. The notes were made out and signed. I made them out and Mathias and his wife signed them. I heard Mr. Hoffman say that he paid about nine or ten dollars on each one of the notes. I delivered the notes to Barbara." In the cross-examination of the witness he stated that the deed and notes were left in his possession, and that the understanding was that he should hold them so that in case she should recover "she could have the property if she liked," and that there was to be no delivery until she died. In his re-examination, the witness was asked this question: "She did not tell you to hold the deed until after her death, did she?" The answer to the question was as follows: "Don't know as she did, but Mathias wanted me to hold the deed. Don't recollect that she said anything about holding the deed. Have held the deed ever since, at the request of Mathias. The old lady never asked me to keep the deed." He was asked this further question: "When did you understand the deed was to take effect,—from the date of the deed or when?" The answer was: "Why, I don't know as there was any understanding about it. The deed was dated on the day I was there."

This is a proceeding in probate, and the finding of the court is to be regarded as the verdict of a jury. It is not to be denied that the testimony of this witness is not altogether consistent. It appears from his cross-examination that the understanding was that the notes should be left in the possession of the witness; and, in case Mrs. Hoffman should recover, she could "have the property if she liked." The court was warranted in finding that this was the mere notion of the witness. He testifies elsewhere that Mrs. Hoffman did not ask him to keep the deed; said nothing about holding it, and that Mathias wanted him to hold it. It is to be remembered that the witness was in the presence of the court, and that what may appear in the abstract of his testimony was not really so inconsistent to those who saw and heard the testimony, as it fell from the lips of the witness. We

think the court was warranted in finding that there was a delivery of the deed to the grantee on the day of its date.

III. It is claimed that the administrator of Margaret Hoffman was entitled to the possession of the personal property, that it might be administered upon according to law. The record does not show that there are any debts due from her estate, nor any other reason why the transfer of the property by Mrs. Hoffman should be disturbed. AFFIRMED.

8. ——: personal property: administration.

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ROBERT DONAHUE, Appellant, v. THOMPSON MCCOSH, Appellant.

1. **Equity**: JURISDICTION: ACCOUNTING. An action for an accounting between partners involving charges of fraud, accident or mistake, and requiring extended investigations of books of account and invoices, is properly brought in equity.

2. ——: PRIOR ADJUDICATION. An adjudication is not conclusive as to matters not in issue unless they are incident to or essentially connected with the subject-matter of such adjudication.

3. ——: ——. An adjudication as to the proper construction of specific provisions of a contract will not bar a subsequent action between the same parties involving claims under other provisions of the same contract, and charges of omissions or undervaluations of property therein referred to through fraud, accident or mistake, though a pleading presenting the same questions was filed in the former action, but, with leave of court, withdrawn without prejudice before trial.

Appeal from Des Moines District Court.—HON. CHAS. H. PHELPS, Judge.

THURSDAY, OCTOBER 23, 1890.

ACTION, entitled as in equity, to recover an amount claimed to be due under a contract dissolving a partnership between plaintiff and defendant, and for certain items alleged to have been omitted from the settlement of said partnership, through fraud, accident or mistake.

The defendant answered pleading a former adjudication as a bar to plaintiff's action, and denying that anything was due to plaintiff under the contract. Also denying that the items named were omitted from the settlement through fraud, accident or mistake, and alleging that certain other items were omitted from the settlement through accident and mistake, and asking an accounting. The case was tried to the court, and the plea of former adjudication sustained except as to plaintiff's claim on the contract. Judgment was rendered in favor of plaintiff on his cause of action on the contract. Both parties appeal.

P. Henry Smith & Son, for plaintiff.

Power & Huston, for defendant.

GIVEN, J.—I. The defendant moved to transfer the case to the law docket. This motion was filed some time before the trial, but not ruled upon until the entering of the final decision when it was overruled, to which defendant excepted. It does not appear that this motion was called to the attention of the court before the trial began, nor that the defendant made any objection to proceeding to try the case in the manner in which it was tried. Each party asks an accounting as to items omitted through fraud, accident or mistake from a settlement had between them; either of which accountings involve extended investigations of books, invoices, etc., containing many items. Under these circumstances the motion to transfer was properly overruled.

1. EQUITY: jurisdiction: accounting.

II. The further discussion may be resolved into the single inquiry whether the plaintiff's causes of action, or either of them, are barred by a former adjudication between these parties. The rule is well established in this state, "That a prior adjudication is a bar not only to all matters actually in issue, but which might or should have been alleged in the pleadings." *Lamb v. McConkey*, 76 Iowa, 47;

2. ——: prior adjudication.

Phillips v. Gephart, 53 Iowa, 396. In Freeman on Judgments [2 Ed.] 249, it is said, "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense." While the former adjudication is conclusive as to all matters actually in issue, it is not as to matters which might have been put in issue in the case, unless they were incident to, or essentially connected with, the subject-matter of the prior litigation. One having two independent causes of action against the same party, by suing upon one would not thereby be barred from afterwards bringing his action upon the other, though both might have been embraced in the first action. To determine whether the matters herein claimed were in issue, or were incident to, and essentially connected with, the subject-matter of the former litigation, we must look to the record in both cases.

III. A contract of dissolution fixing the terms upon which the partnership was to be settled was executed June 18, and another July 24, 1883. The latter does not supersede, but is supplementary to, the former. By these contracts the partnership was dissolved, and terms agreed upon for the division of the property, and settlement of the partnership. The plaintiff was to take the stock and business of the firm at the inventory price at cash value, and all the bills and accounts receivable as held June 30. The bills receivable were divided into good and doubtful; the good being embraced as assets. The plaintiff was to exercise diligence in collecting both, and to pay to defendant one-half of the amount collected on doubtful claims. The defendant to pay plaintiff one-half of the claims listed as good that proved to be uncollectible in a year. The defendant agreed to purchase the shares

3. THE same.

of stock owned by plaintiff in the Hawkeye Manufacturing Company and in the Hawkeye Steel-Fence Company, "at their value, and accrued profits as per inventory now being taken at present cash value of material and machinery now on hand. The bills receivable and accounts receivable as per books to be collected by the companies, and should any of them prove uncollectible R. Donahue is to pay back his share of loss on such bills or accounts receivable to the extent of forty-two per cent. of Hawkeye Manufacturing Company's accounts, and thirteen-thirtieths of Hawkeye Steel-Fence Company accounts." In the second agreement it was provided that, "In ascertaining values of stock in corporations, sold by Donahue to McCosh, accounts and bills were divided into two classes, good and bad; the latter being transferred to profit and loss, and list given Donahue in same manner as was done with firm accounts, and it is agreed that, in all cases where good accounts of either corporation after reasonable diligence prove uncollectible, Donahue shall pay McCosh forty-hundredths of shortage of the manufacturing company and thirteen-thirtieths of shortage of the fence company, on demand and proper showing, and McCosh agrees the company will exercise diligence in collecting accounts transferred to profit and loss, and will pay to Donahue forty-hundredths of collections of the manufacturing company, and thirteen-thirtieths of collections of the fence company as rapidly as collected, less costs, without pay to McCosh."

The plaintiff asks to recover eighteen hundred and fifty-seven dollars and seventy-six cents, as due him under this contract, on accounts and bills receivable of the firm taken by him as good, which were uncollectible, in excess of the amount collected by him on bills listed as bad, and on account of collections on bills receivable by the corporations, listed as bad, in excess of the amount of those listed as good that were uncollectible. This claim, also, includes sixty-three dollars and forty-one cents claimed by plaintiff as his half of moneys

due the firm collected by the defendant. The plaintiff charged that the defendant is liable for further collections than those named, but that plaintiff was not advised of the amount, and that defendant had refused to allow him to examine the books. Wherefore, he asks to recover any additional sum that might appear to be due him.

As a further cause of action plaintiff alleges, in amendment to his petition, that through the fraud of the defendant and by accident and mistake, certain items were omitted from the statement of the assets of the fence company, and certain parts of its assets were inventoried at much less than cash value; that by reason thereof his thirteen shares of stock sold to the defendant were made to appear of much less than their real value. Wherefore he asks an accounting and judgment for the value of said stock over that formerly placed upon it. The answer of defendant denies any indebtedness on account of shortages and collections, and denies that there was any fraud, accident or mistake, nor that any items were omitted or any assets of the fence company undervalued as alleged. It will be seen from this statement of the pleadings, that the issues are, whether there is any sum due to the plaintiff under the agreement on account of shortages and collections, and whether, through fraud, accident or mistake, there were any omissions or undervaluations in estimating the assets of the fence company that affect the value of plaintiff's stock.

The petition in the former action was based upon a clause in the agreements following the provisions for settlement that "The differences in values shall be settled by cash or notes (short time) satisfactory to both parties." It was alleged that there was an agreement as to values of certain property, and a division thereof; that taken by the defendant exceeding in value that taken by the plaintiff in a certain sum, which plaintiff asked to recover under the contract. The defendant answered admitting the agreement as to

values of certain property and a division thereof, and alleging that the difference was then and there paid. The plaintiff in reply alleged, "That by some mistake, oversight or error a proper computation in differences in value was not made although the values were fully agreed upon."

The issues thus joined were whether there was any error in computing the values agreed upon, and whether upon a correct computation there was anything due to the plaintiff under the agreement more than had been paid. There was no issue in the former case as to whether anything was due to the plaintiff on an accounting under the agreements for shortages and collections, nor were there any issues as to omissions or undervaluations, by fraud, accident or mistake in estimating the fence company's assets. The cause of action as shown by the pleadings in that case and in this are entirely distinct, and neither is incident to or essentially connected with the subject-matter of the other. In the former action the plaintiff by amendment asked to recover under the contract on account of shortages and collections, thus presenting the same claim that is presented in this action, though probably not covering so many items. This amendment was by leave of court withdrawn and dismissed without prejudice, thus taking the claim as entirely out of the case as if the amendment had never been made. On the trial of the former case there was some testimony with respect to this subject, but it is evident that this claim of the plaintiff was not in issue, nor passed upon in that case. Our conclusion is that the former adjudication is not a bar to either of plaintiff's causes of action as set up in this case.

IV. We infer from the overruling of defendant's motion to transfer the case to the law docket that it was tried as in equity, yet upon the trial the court sustained defendant's objections to all testimony offered by the plaintiff in support of his second claim, holding the same to be barred by the former adjudication. The testimony so offered was not taken, and hence is not before us so that we can render judgment thereon.

It follows from the views already expressed that the judgment of the district court must be reversed, and with this state of the record the case will be remanded for further trial. As under the conclusions reached the case must be retried, we do not pass upon the issue as to the sum, if any, that either party may be entitled to recover. REVERSED.

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S. HAMILL & Co., Appellants, v. JEOFFREY AUGUSTINE *et al.*, Appellees.

Fraud: TRANSACTIONS BETWEEN HUSBAND AND WIFE. An insolvent husband cannot by procuring a loan of money to be made upon his wife's obligation, and conducting business therewith in her name, protect the results of his industry and skill from the claims of his creditors.

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

THURSDAY, OCTOBER 23, 1890.

ACTION in equity to subject a sum of money due from the defendant railroad company to the payment of certain unsatisfied judgments held by appellants against the defendant, Jeoffrey Augustine. A decree was entered dismissing plaintiffs' petition, from which they appeal.

James C. Davis and *Parson & Dolan*, for appellants.

Gibson Browne, for appellee, Augustine, *et ux.*

Palmer Trimble, for appellee, St. Louis, Keokuk & Northwestern Railroad Company.

GIVEN, J.—I. No question is made as to the indebtedness of the railroad company, nor of Jeoffrey Augustine, to appellants upon the judgments set out. The sole contention is whether the indebtedness of the

company is to Mr. Augustine, or to his wife, Kate Augustine. The indebtedness is upon a contract made with Mr. Sawyer, agent of the company, for boarding furnished on the company's boarding-cars to its laborers. The contract was made, and the business of furnishing boarding carried on, in the name of Mrs. Augustine, but appellants contend that Jeoffrey Augustine was the real party to the contract and business, and that his wife's name was used in fraud of his creditors. Prior to the making of the contract, Mr. Augustine had failed in business, and, at the time it was made, was without money, property or credit, and indebted upon judgments, and otherwise. Mrs. Augustine was also without means, but it is claimed had credit with merchants of Keokuk, where she resided, and that upon this credit she was able to carry on the business. Mrs. Augustine testifies that she knew her husband was in debt, that there was a judgment against him, and that, if he had any property or did business in his own name, they could get out an execution. Being without means, Mr. Augustine solicited a loan of fifty dollars from Mr. Grill, which he made after seeing Mrs. Augustine, and in her name. This loan was paid out of the earnings. The board was furnished on the cars at points distant from Keokuk, and the business was conducted by Mr. Augustine, he hiring help, purchasing supplies along the line, and doing all other things necessary to the management of the business. Mrs. Augustine was not at any time with the cars, and knew nothing as to the business out on the line, except as reported to her by her husband, who she says was serving without any agreement as to compensation. All that she did towards the business was to make some comforts and pillow-slips for use on the cars, and to make some of the arrangements for supplies at Keokuk.

"Transactions between husband and wife to the prejudice of the creditors are to be scanned closely, and their *bona fides* must be clearly established." Wait, Fraud. Conv., sec. 300; *Fisher v. Herron*, 34 N. W. Rep. 365. In *Seitz v. Mitchell*, 94 U. S. 582, it is said:

"Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife, such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors, and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and wife there is, and there should be, a presumption against her which she must overcome by affirmative proof." In *Hamilton v. Lightner*, 53 Iowa, 470, the business was carried on in the wife's name, managed by the husband. The property was claimed to be exempt from his debts on the ground that he loaned his wife the money originally invested. The court says: "We think the law will not permit the husband, in this manner, to bestow all the accumulations of his industry and success in business upon his wife, so as to defeat his creditors. He still remains the head of the family, the manager of his business, and the person who, in fact, acquired the property. The device of making the wife debtor for the money loaned by the husband, and upon this transaction basing her claim of title to the property, has been often resorted to for the purpose of concealing property from creditors. If courts were to hold it sufficient for the purpose intended, there would be nothing in the way of a debtor converting his property into money, and placing it beyond the reach of his creditors, while enjoying the income therefrom." In *Keeney v. Good*, 21 Pa. St. 349, 355, it is said that an arrangement to buy property on the wife's credit, and have it paid for by the husband as her agent, is too unsubstantial, and too easily shammed, to be at all satisfactory. "All these things can be done by mere words, and these are but breath." In *In re Eldred*, 3 N. B. R. 256, it is said: "When a man is in embarrassed circumstances, and insolvent, he cannot

make use of his wife, directly or indirectly, to cover up any of his property, or any of his earnings, or his skill. So far as she gets property of her own, independent of him, she is to be protected; but he cannot make use of her as an instrument to gather about her his means, skill or labor, or anything that is connected with him. Thus, a man has no right to go to his wife and say, 'This is a good bargain. Make this purchase. Give your notes for this property, that property, or the other,'—and make the purchase, and then escape the responsibility of the transaction, so far as he is a debtor, if there is nothing proceeds from his wife as a consideration of the purchase. That is his transaction, the result of his skill and judgment, and his creditors are entitled to it, and he cannot, in that way, cover up the interest which he may have in that property, which is the fruit of his skill and his judgment, from his creditors. If, on the other hand, there is a consideration proceeding from his wife, belonging to her, money or property with which he is unconnected, then she should be protected in the property."

This contract and business was out of the line of anything theretofore pursued by Mrs. Augustine, and such as she was not circumstanced to manage and control. She gives as a reason for intrusting the business to her husband that he was strong and able-bodied, and that she could not go down and do it herself, because she had to remain at home with her child. It is evident that her name was used because of the insolvency of her husband. The money in question is the result of his industry, skill and judgment in the management of the business. We think it is not true, as contended, that it was her credit that furnished the means of carrying on the business. Persons extending credit for supplies say that they would not have done so to the husband; they do not say that they would have given credit to Mrs. Augustine without some other assurance than her ability to pay. One witness says his firm "afforded Mrs. Augustine credit, as we had the right to

have the railroad company pay our bills." Another says: "It was by virtue of this contract with the railroad company that I gave Mrs. Augustine credit. * * * I had the right to put my bills in at the railroad office where they would be paid. I did not furnish her any provisions, until I saw the railroad people." Another states: "It was on the faith of the railroad contract that I gave her credit." The credit was extended upon assurances from the railroad company, rather than to either of the Augustines. We are satisfied from the testimony that Jeoffrey Augustine was the real party to the contract, and in the business, and that the name of his wife was used to cover up whatever might be accumulated by the enterprise, from his creditors. The indebtedness of the railroad company is the result of his industry, skill and judgment in the management of the business. Our conclusion is that the decree of the district court should be reversed, and decree entered as prayed in the plaintiffs' petition. REVERSED.

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JULIA L. BENTLEY, Appellant, v. M. W. TAYLOR, Appellee.*

1. **Landlord and Tenant:** LEASE: INTERPRETATION. An agreement for the lease of a storeroom, cellar and "warehouse in rear of building," "to be used as a boot and shoe store," was made while the building was in course of erection, and contained the following paragraph in writing: "Said first party also to put up two partitions across store room; also one between said partitions; * * * and said partitions to be painted white by said first party. The whole room to be put in good order for use of said second party." *Held*, that the phrase, "whole room," in the last sentence was to be construed as referring to the entire premises covered by the lease.

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* The opinion on the former submission of this case was withdrawn by the court, and, therefore, is not published in these reports. It may be found in 39 N. W. Rep. 267.—REPORTER.]

2. ——: ——: COVENANT: BREACH: DAMAGES. The petition alleged, that, at the time plaintiff took possession, the cellar was insufficiently ventilated, wet and muddy, and that, by reason thereof, the storeroom was rendered damp and moldy, the plaintiff's goods damaged, and both cellar and storeroom made unfit for use as a boot and shoe store. *Held*, that the facts pleaded showed a breach of the express covenant above stated.

Appeal from Black Hawk District Court.—HON. C. F. COUCH, Judge.

THURSDAY, OCTOBER 23, 1890.

ACTION to recover damages for an alleged breach of the covenant of a lease. A demurrer to the petition was sustained, and plaintiff appeals. Upon the former submission, the judgment of the district court was affirmed. A rehearing having been granted, the case was resubmitted.

Boies, Husted & Boies, for appellant.

Mullen & Hoff, for appellee.

ON REHEARING.

GIVEN, J.—I. The questions discussed are whether the lease, which is made a part of the petition, contains an express covenant that the demised premises should be fit and suitable for the purposes for which they were to be used; and, if not, whether under the law such a covenant can be implied. The lease covers "the lower storeroom and cellar," also the "warehouse in rear of building." It was executed when the building was in course of construction, and is for the term of three years, "commencing on the tenth day of August, 1882, or as soon thereafter as same is completed, not exceeding September 15, 1882," the premises "to be used as a boot and shoe store," and for no other purpose. The lease is upon printed form, filled up in writing. The concluding paragraph is in writing, and as follows: "Said first

2. LANDLORD and tenant: lease: interpretation.

party also to put up two partitions across storeroom; also one between said partitions; partitions to be made of boards eight feet high, with proper doors for passage, and said partitions to be painted white by said first party. The whole room to be put in good order for use of said second party."

The contention is as to the construction of the last sentence, appellant claiming that the words, "whole room," mean the entire premises covered by the lease, and appellee claiming that it only refers to the storeroom. The definitions cited show that the word "room" has different meanings, such as, "Space in a building marked off or set apart by a partition." "Space which has been set apart or appropriated to any purpose." Webster. The sense in which the word is used must be determined from its connection, and the circumstances under which it is used. The sentence in which it is used is disconnected from what precedes it by a period. If the storeroom alone was meant, why not have so written it instead of "whole room" that may apply to all. It is a well-known fact that, in filling such blank forms, the agreements are not always as connectedly and plainly stated as when the instrument is written out at length. In construing the language employed, we must have in mind the purposes of the parties. It was manifestly the purpose of the plaintiff to get the premises fit for use as a boot and shoe store. It would be at least unusual that she should intend to lease premises, only part of which was to be put in good order for her use. It would require a clear expression to establish such an unusual agreement. As the defendant leased the premises to be used as a boot and shoe store, it is reasonable that he should intend that the entire premises should be in good order for that use. "The whole room" may mean the "space which has been set apart, or appropriated," by the lease, to the purpose of plaintiff's business. To say that these words were used in that sense is in harmony with their meaning, connection and the evident purpose of the parties, while, to say that they refer to the storeroom only is to hold that the parties made an

unusual, if not unreasonable, agreement, and expressed it in indefinite terms.

In the former opinion it was held that the words, the whole room," refer to the storeroom only. Upon a careful review of the matter, we are, for the reasons already stated, brought to a different conclusion. We think the lease, properly construed, contains an express covenant that the defendant would put the entire premises in good order for plaintiff's use as a boot and shoe store by September 15, 1882. It will be observed that this is not a covenant to keep the premises in good order in the future, but that they would be in good order for plaintiff's use at the time possession was given.

II. Our next inquiry is whether the petition alleges a breach of this express covenant. The covenant being as to the condition of the premises at the time possession was to be given, the question as to a breach turns upon their condition at that time. If the premises were then unfit, or less valuable, for plaintiff's use, or if they became so thereafter from causes then existing, that would be a breach of the covenant; but if they became unfit, or less valuable, for plaintiff's use, after she took possession, and from causes arising thereafter, that would not be a breach of the covenant. The allegations are that, at the time plaintiff took possession, the cellar was insufficiently ventilated, wet and muddy, and that, by reason thereof, the storeroom was rendered damp and moldy, and plaintiff's goods damaged, and both cellar and storeroom made unfit for use as a boot and shoe store. Accepting these allegations as true, which we do, for the purpose of the demurrer, they clearly show a breach of the expressed covenant.

2. —:—: covenant: breach: damages.

This view of the case renders it unnecessary that we notice the question discussed as to an implied covenant. Something has been said in argument as to the measure of damages; but, as that question was not raised by the demurrer, we are not called upon to consider it.

Our conclusion is that the judgment of the district court should be REVERSED.

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J. M. KNIGHT, Appellee, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

1. **Railroads**: NEGLIGENCE: FIRE: EVIDENCE. In an action against a railroad company to recover for the loss by fire of certain household goods situated in a house located four hundred and twenty-one feet from defendant's right of way, after proof that, shortly before the fire, one of defendant's engines had passed along its road, that a pile of lumber on its right of way had been set on fire, and that a hard wind was blowing at the time from the lumber pile toward the plaintiff's house, the plaintiff introduced evidence, against defendant's objection, that charred shingles after the fire, and on the same day, were found a quarter of a mile beyond plaintiff's house, and in the direction the wind was blowing. *Held*, that the evidence was admissible as tending to show the source of the fire whereby plaintiff's property was destroyed, and that an instruction, asked by defendant, that from the facts proven no inference could be drawn as to the source of the fire, was rightly rejected.

2. ———: INSTRUCTIONS: PRACTICE. The error of the trial court in failing to write the word "given" upon the margin of instructions asked, and given to the jury, is not available on appeal to a party who took no exception to such oinission in the court below.

3. ———: ———: PROOF OF NEGLIGENCE. The evidence showed that large cinders of the size of a hickory nut were thrown from the smokestack of defendant's engine, and that the spark-arrester of such engine to permit the escape of such cinders must have been out of repair. *Held*, that the evidence warranted the inference that defendant's employes, who operated the engine, had knowledge that the spark-arrester was out of repair, and that such knowledge would support a finding that the defendant was negligent.

4. **Appeal**: RECORD: AMENDED ABSTRACT. Where on an appeal to the supreme court, an amended abstract of the record is filed by the appellee denying the correctness of the abstract filed by the appellant, and alleging that such amended abstract with appellant's abstract contain all the evidence, and the correctness of the amended abstract is not denied, its statements will be taken as true, and so much of the evidence contained in appellant's abstract as is denied by the amended abstract of the appellee will not be regarded as a part of the record.

5. **Instructions.** Where the rule embodied in an instruction asked by one of the parties to a cause is fairly presented in instructions given by the court, the refusal to give the same to the jury is not erroneous.

Appeal from Mahaska District Court.—HON. D. RYAN, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION to recover for personal property of plaintiff, burned by fire set out by an engine operated upon defendant's railroad. There was a judgment on a verdict for plaintiff. The defendant appeals.

Seevers & Seevers, for appellant.

H. H. Sheriff and *Bolton & McCoy*, for appellee.

BECK, J.—I. The property destroyed was household furniture, in a house four hundred and twenty-one feet from defendant's right of way, which was burned. The fire caught in the roof of the house. The evidence shows that an engine drawing a train, shortly before the fire, had passed along the road, and that a pile of lumber, or timber, on the right of way, was set on fire, and that a hard wind was blowing towards the house from the timber and right of way. Plaintiff's theory was that the fire was blown from the engine or burning timbers to the house. It was necessary, in order to support this theory, to show that the wind blew with sufficient violence to carry the fire over the distance intervening between the house and the source of the fire. To establish this fact evidence was admitted against defendant's objection, which is renewed in this court, to the effect that charred shingles after the fire, and on the same day, were found a quarter of a mile beyond the house in the direction the wind was blowing. The evidence was clearly admissible, as plainly shown by the statement of facts just made. It tends to show that

1. RAILROADS: negligence: fire: evidence.

the fire was communicated to the house by the defendant's engine, or from the burning timbers on defendant's right of way. An instruction asked by defendant to the effect that from these facts no inference could be drawn as to the source of the fire was rightly rejected.

II. The court below failed to write the word "given" upon the margin of two instructions given to the jury, as required by the statute. This omission is now made a ground of complaint by defendant. It is sufficient to say that no exception was taken to the omission, nor objection thereto made in the court below. It cannot be first made the ground of objection in this court.

2. ——: instructions: practice.

III. The court below directed the jury that if defendant's employes knew that the spark-arrester attached to the smokestack of the engine was out of repair, they would be authorized to find defendant negligent in not keeping the engine in repair. This instruction, it is insisted by defendant's counsel, is to be regarded as the law of the case; and that there was an entire absence of evidence tending to show that the employes of defendant knew that the spark-arrester was out of repair. We cannot concur in counsel's position as to the evidence on this point. It was shown that from the engine large cinders the size of a hickory nut were thrown through the smokestack, and that the spark-arrester permitting such cinders to escape must have been out of repair. The jury could have inferred that defendant's employes who operated the engine observed the large cinders and sparks thrown out of the engine, and were thereby informed of the defective condition of the engine.

3. ——: ——: proof of negligence.

IV. The defendant's abstract contains a statement that it presents all the evidence in the case. It also alleges that there was no evidence showing certain matters connected with the setting out and spread of the fire. Plaintiff files an additional abstract setting out parts of the evidence, which, with the evidence in defendant's abstract, it

4. APPEAL: record: amended abstract.

alleges is all of the evidence in the case. It also contains a statement, denying that defendant's abstract contains all the evidence, and denying the allegation in defendant's abstract, that certain evidence mentioned therein was not given. This amended abstract is not denied. Its statements, therefore, must be taken as true, and we must hold that all of the evidence set out in defendant's abstract, and denied by plaintiff, is not before us. *Marsh v. Smith*, 73 Iowa, 295; *Sullivan Savings Institution v. Copeland*, 71 Iowa, 67; *Foley v. Hefferon*, 70 Iowa, 572; *Kent v. Coquillard*, 67 Iowa, 500; *Love v. Donaldson*, 63 Iowa, 631; *Kearney v. Ferguson*, 50 Iowa, 72.

V. An instruction was asked by defendant (the ninth) and refused, which is now made the ground of complaint. It was to the effect that the burden rested upon plaintiff, to show by his evidence that the property was burned by fire set out by defendant, which cannot be inferred from the fact that fire was set out on the right of way by defendant. The rule of this instruction is fairly presented in instructions given by the court. It was not necessary to repeat it.

5. INSTRUCTIONS

These considerations lead us to the conclusion that the judgment of the district court ought to be AFFIRMED.

E. C. BLAIR, Appellee, v. MADISON COUNTY, Appellant.

1. **Personal Injury**: CARLISLE LIFE TABLES AS EVIDENCE. Where in an action to recover damages for a personal injury the evidence is conflicting as to the permanency of the injury sustained, the Carlisle life tables may properly be received in evidence for the consideration of the jury in case they find the injury to be permanent.

2. ——: EXPERT TESTIMONY: PHYSICIAN. The question, put to a physician who had examined the plaintiff, whether his statement of plaintiff's injuries and symptoms, and the absence of external appearance of injury, were "consistent with his medical books" is not objectionable on the ground that the medical books are the best evidence of their contents.

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3. ——— : EVIDENCE. The testimony of a witness as to complaints of pain or disease made by the plaintiff a week after the accident in which his injury was sustained is competent to show the condition of plaintiff's health, and the permanency of the injury received.

4. ——— : ———. Where the record fails to disclose what were the facts sought to be elicited by questions to which objections were sustained in the trial court, the supreme court will presume that the evidence was rightly rejected.

5. ——— : ———. Where the evidence upon the material issues in a cause is conflicting, the verdict of the jury will not be disturbed.

6. ——— : INSTRUCTION. The refusal of the trial court to give to the jury an instruction asked, the substance of which is embodied in other instructions given by the court, is not erroneous.

7. ——— : MISCONDUCT OF COUNSEL IN ARGUMENT : PRACTICE. The use of improper language by counsel in argument to a jury will not constitute ground for the reversal of the judgment of the trial court on appeal when no objection was taken thereto in the court below, nor any instruction asked correcting the error.

8. ——— : NEW TRIAL : NEWLY-DISCOVERED EVIDENCE. Newly-discovered evidence which is merely cumulative will not entitle a party to a new trial.

9. **Assignment of Errors.** A general assignment of error directed to the court's charge to the jury as a whole, without specifying the particular errors complained of, will not entitle a party to have considered the error contained in any single instruction.

Appeal from Madison County District Court.—HON. J. H. HENDERSON, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION to recover for personal injuries to plaintiff from a fall from his horse, caused by a defect in the floor of a county bridge, over which plaintiff was at the time riding. There was a judgment on a verdict for plaintiff. The defendant appeals.

Eli Wilkin, *John Guiher* and *John Leonard & Son*, for appellant.

A. R. Dabney and *T. C. Gilpin*, for appellee.

BECK, J.—I. Plaintiff, a young man, then twenty-two years of age, while riding over a county bridge, was thrown from his horse by reason of the animal stepping through a hole in the floor of the bridge. This action is brought to recover the damages he sustained from the injuries he thus received, which he claims were severe and permanent. The facts of the case will be stated so far as is necessary for a correct understanding of the questions involved, and the ground of the decision thereon in connection with the discussion of these questions.

II. The Carlisle life tables were admitted as evidence against objections made by defendant's counsel. It is now insisted that they should have been excluded for the reason "that the evidence is clear and conclusive that there was no permanent injury." But this view of the evidence is incorrect. The most that can be said on the point is that the evidence is conflicting. It was the province of the jury to settle the conflict. If they found that plaintiff's injury was permanent, the life tables were to be considered.

1. PERSONAL injury: Carlisle life tables as evidence.

III. A physician who had just made an examination of plaintiff was asked whether his statement as to the injuries and his symptoms, and the absence of external appearance of injury, were "consistent with his medical books." The question was objected to, on the ground that "the medical books are the best evidence of their contents." The question does not call for evidence as to the contents of medical books. It, in effect, seeks the opinion of the witness, who being a physician was qualified to give it, upon the question, whether the science of medicine, which is taught in the "medical books," would authorize the conclusion that plaintiff could have the symptoms of which he complained, in the absence of external appearances of injury; or, in other words, whether, in his opinion as a medical man, the real symptoms would be manifest in

2. —: expert testimony: physician.

the absence of "external appearances of injury." The question sought to elicit an opinion upon a matter which the witness, as an expert, could properly express.

3. —: evidence.

IV. A witness was asked to state what complaint of pain or disease plaintiff made about a week after the accident. It is now insisted that, as plaintiff's complaints "were no part of the *res gestæ*, they were not admissible. They were not admitted on that ground, but for the reason that his complaints of pain or disease were competent to show the condition of his health, which was in issue under his claim that he was severely and permanently injured. The statements or declarations of the plaintiff were properly shown in evidence. 1 Greenl. Ev., sec. 102.

4. THE same.

V. Questions were asked a witness intended to elicit evidence as to statements made by a bridge-builder in regard to the bridge, and as to the fact whether the bridge-builder had made a report as to the sufficiency of the floors. Objections to the questions were sustained. It is not shown in the abstract what statements and facts were proposed to be proved by the evidence sought by the questions. It is, therefore, not shown that the proposed evidence is competent. In the absence of such showing, we are requested to exercise the presumption that the court rightly rejected the evidence upon information as to its purport showing it to be incompetent.

5. THE same.

V. Counsel for the defendant insist that the evidence fails to show that plaintiff was injured at all by the accident; that he was not himself negligent; that it does show that defendant had no notice of the defects in the bridge, and that plaintiff failed to use reasonable means to effect a cure; and that the evidence does not show defendant's negligence, nor the extent of plaintiff's disability by reason of the injury. All that can be said as to the evidence on these points is that it was conflicting. It was for the jury to decide upon this conflict. It cannot be said that their verdict is so without the support of evidence that it ought to be set aside.

VII. The defendant asked an instruction, which was refused, to the effect that, if an examination of the bridge by a competent person, and a report that it was safe for a reasonable time, had been made, defendant would not be negligent until that time expired, unless some member of the board of supervisors had been notified of its dangerous condition, and defendant had neglected in a reasonable time to make an examination of its condition. An instruction was given substantially to the same effect. It was not error to refuse to repeat it.

6. ——: instruction.

VIII. It is shown by a bill of exceptions that one of the counsel for plaintiff in the closing argument made a statement as to the views of "one of the heaviest taxpayers of the county," to the effect that plaintiff ought to recover; that defendant had attemped to defeat plaintiff's case by the evidence of criminals; that the county is wealthy,—and other equally improper statements and allusions, with taunts and offensive allusions to counsel on the other side. This manner of argument must always be condemned, and ought never to be permitted. We do not know of any circumstances which would justify it, though it may sometimes be palliated on the ground that it was indulged in as a defense or reply to the same kind of argument first used by the other party,—a kind of hurling back of foul weapons, only sufficiently poisonous to irritate without destroying. While this would not justify the use of such prohibited missiles of forensic warfare, it is to some extent a palliation of the offense. It ought to be said, in justification of the judge trying this case, that much of the time during this argument he was in another room, adjoining the court room, preparing instructions, and did not hear some of the objectionable remarks, and that counsel on the other side made at the time no objection to the language now complained of, and in no way called the court's attention thereto, nor asked that the offensive and unlawful arguments be arrested. Counsel for defendant remained entirely quiet until after the verdict,

7. ——: misconduct of counsel in argument: practice.

when all the injury, if any, had been done. Objection could have been raised while the unlawful argument was being made, indeed, upon its very commencement. We have no doubt that thereupon it would have been arrested by the court below. If it had still been permitted, this court would have sent the cause back for another trial, in accord with the rules of the law. Counsel should unite with the courts in endeavors to overthrow this practice and frontier style of trials, and sustain methods and manners in accord with the better civilization of the day. But, as the record shows that no objections and exceptions were made and taken at the time when the unlawful argument of defendant's counsel could have been arrested, and no instruction asked by defendant to correct the error, and avert injury and prejudice resulting therefrom, under the peculiar facts of the case, we ought not to reverse the judgment of the court below on the ground of the improper conduct of counsel.

IX. A motion for a new trial was based upon the ground, among others, of newly-discovered evidence. It is sufficient to say that, as the new evidence was cumulative, the motion was rightly overruled.

8. ——: new trial: newly-discovered evidence.

X. It is insisted that an instruction given by the court to the jury is erroneous. But the assignment of errors is directed against all the instructions given by the court *en masse*, without specifying the particular errors complained of by counsel. Such an assignment is in violation of the statute, and will not permit a review of an instruction assailed in argument. Code, sec. 3207; *Moffat v. Fisher*, 47 Iowa, 474.

9. ——: assignment of errors.

The foregoing discussion disposes of all questions in the case. The judgment of the court below is AFFIRMED.

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JAMES L. DODD, Appellant, v. D. W. SCOTT, Appellee.

Homestead: FORECLOSURE OF MORTGAGE: RES ADJUDICATA. A husband, against whom a decree of foreclosure of a mortgage on real estate has been duly obtained, cannot in an action of forcible entry and detainer to recover possession after the period of redemption, set up the defense that his wife, who was not a party to the former suit, has a homestead interest in the mortgaged premises; such fact, if a defense at all, being available in the former suit, must be deemed to have been adjudicated or waived.

Appeal from Jackson District Court.—HON. C. M. WATERMAN, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION for forcible entry and detention of real property. The plaintiff sold to the defendant the premises in controversy by contract, the deed to be executed when certain payments were made. Default was made in the payments, the contract foreclosed by action against the defendant, and the premises sold on foreclosure judgment to the plaintiff, and, at the close of the period of redemption he received his deed, after which he instituted this proceeding before a justice of the peace to obtain possession. In the foreclosure suit, the wife of the defendant was not made a party, nor is she a party in this proceeding. Before the justice, the defendant answered, presenting as defensive matter that before the commencement of the foreclosure proceeding he was the head of a family, and that Sarah A. Scott was his wife; that since November, 1886, he and his wife had occupied the premises in question as a homestead; and that his wife was not made a party to the foreclosure proceedings, nor her homestead interest therein foreclosed. To this answer plaintiff demurred, whereupon the justice certified the case to the district court as involving title to real estate, under the provisions of Code, section 3535.

In the district court the plaintiff moved to remand the cause to the justice for trial, for the reason that the district court had no jurisdiction, and that it was erroneously transferred by the justice. Pending the motion, however, the defendant amended his answer by alleging, "that the right and possession he now has in and to said real estate were acquired by and through the said homestead right of the said Sarah A. Scott, his wife." To the answer, as amended, there was a demurrer, which the court overruled, and the plaintiff, electing to stand thereon, appealed to this court.

Hayes & Schuyler and *B. F. Thomas*, for appellant.

No appearance for appellee.

GRANGER, J.—The case must be reversed, and, as we are unaided by brief from appellee, we limit our consideration to a single question. See *McKern v. Albia*, 69 Iowa, 447; *Deeds v. Chicago, R. I. & P. Ry. Co.*, 69 Iowa, 164; *Gilfeather v. Council Bluffs*, 69 Iowa, 310.

A point urged in argument by the appellant is, that the husband, who was a party to the foreclosure proceeding, cannot, in this case, set up the homestead right of the wife as a defense, and it seems difficult to gainsay the proposition. With the amendment, the plea appears to be one personal to the defendant; that is, he does not seek to defend for his wife, but for himself, because of a "right and possession" acquired "through the homestead right of the wife." Being a party to the foreclosure suit, if he had a homestead right available to him as a defense therein, he must interpose it, or the right is lost. Now the wife was not a party to that proceeding, and any rights he had available to him because of the wife's homestead right (if there could be any) was just as available for defense in that suit as in this, and just as available then as any other right he had. We must assume, then, that all

rights personal to the defendant have been adjudicated or waived, and that under the claim of the demurrer, because of the wife not being a party to this suit, no claims based on her homestead rights are available as a defense. With this holding, no question of title is involved in the issues, and the cause should be remanded to the justice for trial. REVERSED.

A. N. HAGAN, Appellee, v. MERCHANTS & BANKERS' INSURANCE COMPANY, Appellants.

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1. **Fire Insurance**: ALTERATION OF WRITTEN INSTRUMENT: PLEADING: EVIDENCE. In an action to recover upon a policy of insurance the insurance company alleged as a defense, that the policy had been altered since delivery without its knowledge or consent. The plaintiff denied the alteration, but alleged that if any change had in fact been made it was done before delivery to the plaintiff. *Held*, that the defendant's allegation charging an alteration of the policy was not such a denial of the instrument as threw upon plaintiff the burden of proving the execution of the same; but that such proof being necessary to support defendant's charge of alteration, its introduction by plaintiff was error without prejudice.

2. ——— : ———: EVIDENCE: BURDEN OF PROOF. A mere alteration apparent upon the face of a written instrument raises no presumption that the same has been fraudulently changed since its delivery, and will not impose upon a party claiming thereunder the burden of explaining such change before introducing it in evidence.

3. ——— : PRINCIPAL AND AGENT: WAIVER. Where the agent of a fire insurance company, at the time of accepting an application for insurance, has knowledge of the existence of an amount of insurance on the property to be insured in excess of that allowed under a condition in the policy issued on such application, the company will be presumed to have waived such condition; and like knowledge on the part of the insured will not prevent his recovery under such policy.

4. ——— : PROOF OF LOSS: EVIDENCE. The form or sufficiency of the proof of loss made by plaintiff not being in issue, but simply the fact whether such proof had been made, *held*, that such fact might be established by parol, and no prejudice could arise from the introduction of secondary evidence of the notice served upon the defendant.

5. ———: ———: ———. After the introduction of oral evidence, against the objection of defendant, to the fact that a letter had been written the defendant concerning the policy in question, the proof of loss, and payment thereunder, the plaintiff offered in evidence a letter received from defendant's attorney, purporting to be in reply to the above, and stating the reason why payment of the policy was refused to be the taking out of additional insurance, and other irregularities, in violation of the policy, but making no objection to the sufficiency of proof of loss. *Held*, that parol evidence to the fact of plaintiff's letter and its subject-matter was competent, and that the admission of defendant's reply, though not pertaining to a fact in issue, was error without prejudice.

6. ———: VERDICT OF JURY: APPEAL. The verdict of a jury will not be disturbed if there is any evidence to support it.

7. ———: MUTUAL COMPANIES: PREMIUM NOTE: ASSESSMENTS. No action can be maintained upon a promissory note given to secure the premium upon a policy of insurance in a mutual fire insurance company, and payable in installments on assessment by the directors of such company, when, up to the date of loss under said policy, no assessment against said insured has been made.

Appeal from Henry District Court.—HON. CHARLES D. LEGGETT, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION upon a policy of insurance against loss by fire. The petition alleges the issuing of the policy, the loss of the property by fire, the value thereof, and notice and proof of loss within sixty days. The policy and copy of application attached is set out as an exhibit to the petition. In the description, in the application, of the building in which the insured merchandise was contained, the question, "Material of roof" is answered, "Iron and shingle," and in the policy it is written, "Iron roof and shingle building." The policy contains a provision that it shall be void unless consent in writing is indorsed thereon by the company if the assured should then or thereafter procure other contracts of insurance on the property than the twenty-five hundred dollars' concurrent insurance granted. The defendant answered denying that the policy set out is the policy issued by it, for that the same has been

changed and altered without their knowledge or consent since its delivery; that the words "and shingles," where they occur in the application and policy, were added therein without the knowledge, consent or authority of defendant, and after the policy, with a copy of the application attached, had been delivered to the plaintiff. It is alleged in the answer that the plaintiff changed the policy and copy of application, without the knowledge, consent or authority of the defendant, by inserting the words "and shingle" therein. The answer denies the loss and proof of loss, and alleges that plaintiff, in violation of the terms of the policy, had procured concurrent insurance in excess of the twenty-five hundred dollars, for which permission had been given, and that defendant had never indorsed its consent on said policy, or in any way consented to his having procured such additional sums of other and concurrent insurance. The defendant, by way of set-off, asks to be allowed upon the plaintiff's note for one hundred and thirteen dollars, given to secure the premiums on said insurance, ninety *per cent.* thereof. To this the plaintiff answered admitting the execution of the note, and denying that there were any assessments due and unpaid on the same at the time of the destruction of the property, and denying that there is anything due on the note. The plaintiff filed a reply to the defendant's answer denying all allegations charging on him any alterations of the policy, and alleging "that if any change was made in said policy or application as indorsed thereon, which plaintiff does not admit, same was changed before such policy and application came into plaintiff's hands or was delivered to plaintiff, and plaintiff is not chargeable therewith; but he denies any such change or alteration was made as charged in answer and amendments." It is alleged in the reply that defendant had full knowledge at the time this insurance was applied for of the amount of insurance plaintiff was taking out, and the companies and amounts in each. It is also alleged in the reply that defendant at no time demanded or required further or

other proofs of loss than those sent, but retained the same without objection thereto, wherefore, it is claimed, that the defendant is now bound thereby, and is estopped from denying that proofs of loss were made. The case was tried to a jury, and verdict and judgment for plaintiff. The defendant appeals.

Baker & Haskins, for appellants: The policy upon its face shows that it was altered by some one other than the draftsman who wrote the other written portions of the policy; and the change is of such a nature and character as to cast upon the plaintiff the burden of proof showing either, *first*, why such change was made, and the authority for making it, or, *second*, to show that it was in the condition it now is when received by the plaintiff. Greenleaf on Evidence [13 Ed.] sec. 564, and note; *Jones v. Ireland*, 4 Iowa, 63; *Henman v. Dickinson*, 5 Bing. 184; *Taylor v. Mosley*, 6 Car. & P. 279, 280; *Knights v. Clements*, 8 Adolph. & Ell. 215; *Mills v. Barnes*, 11 N. H. 397; *Clifford v. Parker*, 2 Man. & Gr. 910; *United States v. Linn*, 1 How. 104; *Smith v. United States*, 2 Wall. 219; *Wilde v. Armsby*, 6 Cush. 183; Byles on Bills [2 Am. Ed.] 248, 249. In *Harlan v. Berry*, 4 G. Greene 212, there was no question arising as to where the burden would rest if the alteration was deemed material and of such character and appearance as to discredit or cast a suspicion on the instrument. In *Jones v. Ireland*, *supra*, the court held that, where the words "ten per cent." in a different-colored ink were written in a blank apparently left for the purpose—there being no erasure or interlineation—that fact was not sufficient of itself to raise such suspicion or presumption of alteration as to require explanation; but, where there is an interlineation in a different handwriting and different-colored ink, the court held that the burden is upon the party offering the instrument. And see *Ault v. Fleming*, 7 Iowa, 143; *Wilson v. Harris*, 35 Iowa, 507; *Odell v. Gallup*, 63 Iowa, 253; *King v. Stewart*, 68 Iowa, 13. The defendant averred the alteration in its

answer. Without any reply this would stand traversed. Code, sec. 2625; *University of Des Moines v. Livingston*, 57 Iowa, 507; *Shaw v. Kendig*, 57 Iowa, 390; *Cassady v. Canton*, 47 Iowa, 221. The plaintiff in his reply took the affirmative by averring in avoidance that the alteration was made before the policy and application came into plaintiff's hands. By thus replying the plaintiff confessed and avoided, and assumed the burden of proving the same. *Clapp v. Cunningham*, 50 Iowa, 307; *Meadows v. Insurance Co.*, 62 Iowa, 387. The statements in the application were false as to the amount of insurance. In *Bartholomew v. Insurance Co.*, 25 Iowa, 507, this court holds that where the assured knew that the agent taking the application was to forward it to the company to whom it was submitted, and by whom the risk was to be approved or rejected, and that the statements in the application were the sole basis of its acceptance, then he (the insured) must see the representations in the application are not untrue. *Johnson v. Insurance Co.*, 45 N. W. Rep. (Dak.) 799. It is true that the averment of over insurance stands denied. But the policy with the application indorsed thereon is put in evidence, and this proves the allegation of the answer as to the representation. "In the absence of fraud or mistake, a party will not be heard to say he was ignorant of the contents of a contract signed by him." *Culbertson v. N. C. Home Ins. Co.*, 2 S. E. Rep. 261. In *Walsh v. Insurance Co.*, 73 N. Y. 9, the court says: "The plaintiff is presumed to have known the contents of the contract signed by him." See also to same point: *Morrison v. Insurance Co.*, 6 S. W. Rep. 606; *Cleaver v. Insurance Co.*, 32 N. W. Rep. (Mich.) 660; s. c., 39 N. W. Rep. 571; *Insurance Co. v. Mowry*, 96 U. S. 544; *Mutual Benefit Association v. Hickman*, 5 S. W. Rep. 544; *Moore v. Insurance Co.*, 76 Iowa, 412. This same question has been before the supreme court of Dakota in a very recent case. *Smith v. Insurance Co.*, 43 N. W. Rep. 810. The contract of insurance, as contained in the policy, provides that no agent shall have any authority to erase, strike out,

waive, modify or change any of its provisions. As to effect of such provision see *Clevenger v. Insurance Co.*, 3 N. W. Rep. 313; *Cleaver v. Insurance Co.*, 32 N. W. Rep. 660; 39 N. W. Rep. 571; *Hawkins v. Insurance Co.*, 35 N. W. Rep. 34; *Marion v. Insurance Co.*, 84 N. Y. 278; *Globe Insurance Co. v. Wolf*, 95 U. S. 372; *Ins. Co. v. Norton*, 96 U. S. 240; *N. Y. Life Ass'n v. Fletcher*, 117 U. S. 519; *Lochner v. Insurance Co.*, 17 Mo. 256; *Richards v. Main*, 46 Me. 394.

Woolson & Babb, for appellee: There was no question raised by pleading or evidence, but that the policy attached to the petition was the one issued to plaintiff by defendant, except the question as to words "and shingle," which the answer alleged to have been added after delivery. Under these circumstances plaintiff had the right to introduce the policy in evidence without preliminary proof, and the burden was on defendant to show any change in it. Code, sec. 2730. The object of this statute was to affect the burden of proof as to such instruments as come under it. *Sankey v. Trump*, 35 Iowa, 267. The general rule seems to be that such alteration, if apparent on the face, will be deemed to have been innocently made before delivery, as fraud and wrong will not be presumed. Am. & Eng. Ency. of Law, title, Alteration of Instruments; 2 Parsons on Contracts, 722, note *y;* 1 Cowen & Hill's notes to Phillips on Evidence, 461, 464, where the cases are reviewed; *Harlan v. Berry*, 4 Greene, 212; *Jones v. Ireland*, 4 Iowa, 63; *Gooch v. Bryant*, 13 Me. 386; *Clark v. Rogers*, 2 Greenleaf, 147; *Cumberland Bank v. Hall*, 1 Halstead, 215; *Bailey v. Taylor*, 11 Conn. 531; *Ault v. Fleming*, 7 Iowa, 143; *Warren v. Chickasaw Co.*, 13 Iowa, 588; *Van Horn v. Bell*, 11 Iowa, 466; *Wilson v. Harris*, 35 Iowa, 507; *Wing v. Stewart*, 68 Iowa, 13. The pleadings in this case and defendant's testimony both admit the issuing of the policy, but allege a change. It was not necessary for plaintiff to introduce the policy. The contest was over the allegation of the answer as to change. On

this point, see *McArthur v. Life Ass'n*, 73 Iowa, 336. The allegations of the answer were not admitted by the filing of a reply. *Eikenberry v. Edwards*, 71 Iowa, 82; *Tobin v. Mutual Aid Society*, 72 Iowa, 261. Under chapter 211, Acts, Eighteenth General Assembly, Tam was the agent of the insurance company, and his knowledge was the knowledge of the company. The company then had full knowledge of the exact amount of insurance to be placed on the goods at time of issuing the policy,—this being so, it is estopped from afterwards denying it. *Williams v. Insurance Co.*, 50 Iowa, 568; *Jordan v. Insurance Co.*, 64 Iowa, 316; *Bennett v. Insurance Co.*, 70 Iowa, 600; *Miller v. Insurance Co.*, 70 Iowa, 709; *Kitchen v. Insurance Co.*, 57 Mich. 35; *Broodup v. Insurance Co.*, 7 N. W. Rep. (Minn.) 735; *Shafer v. Insurance Co.*, 10 N. W. Rep. (Wis.) 382. The petition alleged that due proof of loss was given, and the answer simply denied this without setting up any special defense as to its insufficiency; all plaintiff was required to do was to introduce evidence in parol, that a paper purporting to be a proof of loss was sent to defendant within the time allowed by the statute, and that no objection was made to it. Greenleaf on Evidence, sec. 561; *Johnson v. Haight*, 12 Johns. 470; *Lindenberger v. Beall*, 6 Wheaton, 104; *Eagle Bank v. Chapin*, 3 Pick. 180; *Levitt v. Simms*, 3 N. H. 14; 2 Daniel's Negotiable Inst., sec. 1051; *McClenon v. Railway Co.*, 69 Iowa, 320; Acts, 18th Gen. Assem., sec. 3, ch. 211; *Shawhan v. Loffer*, 24 Iowa, 217.

GIVEN, J.—I. On the trial, plaintiff offered in evidence the policy, and copy of application attached, to which defendant objected, on the ground that it was apparent on the face of the instruments that they had been changed; wherefore the burden was on plaintiff to account for the change before he could introduce the instruments in evidence, and also upon the ground that plaintiff confessed the change in his reply, and had not

1. FIRE insurance: alteration of written instruments: pleading: evidence.

offered evidence tending to avoid it. This objection was overruled. The defendant asked an instruction to the effect that, if the jury found that there was ground for suspicion on the face of the instruments that the policy had been altered as alleged, then the burden was upon the party offering it in evidence to show "when such alleged alteration was performed, by whom, and the intent with which done." This instruction was refused, and one given that "the burden of establishing that the words were added to one or both of the places alleged after delivery of the policy rests upon the defendant." The overruling of said objection, the refusal to instruct as asked, and the instruction given, are assigned as error.

The books are full of diverse decisions as to whether, on the production of a written iustrument, which obviously has been altered, it is incumbent upon the party offering it in evidence to explain its appearance. Some hold that an alteration apparent on the face of the writing raises no presumption either way; some that it raises a presumption against the writing, and, therefore, requires some explanation to make it admissible; others hold that it raises such presumption only when the apparent alteration is suspicious; and yet others, that it is presumed, in the absence of explanation, that the alteration had been made before delivery. The authorities are so numerous that we refrain from citing any, but refer to the American and English Enclyclopedia of Law, under "Alteration of instruments," where many of the authorities sustaining these different views are cited. This question was incidentally noticed, but not passed upon, in *Jones v. Ireland*, 4 Iowa, 69; *Ault v. Fleming*, 7 Iowa, 143; *Wilson v. Harris*, 35 Iowa, 507; and *Wing v. Stewart*, 68 Iowa, 13. These cases were disposed of upon other grounds, and the question before us has never been directly passed upon by this court. The issues involved in this defense are, whether the policy was altered as alleged, and, if so, whether after delivery to plaintiff, and without authority of the

defendant. In *Jones v. Ireland*, *supra*, it was held to be a question of fact for the jury whether there had been an alteration as alleged. The instrument was certainly competent evidence as bearing upon this question, and was, therefore, proper to go to the jury; but the contention is whether the plaintiff was entitled to offer it without explanatory proofs.

If the appearance of the instrument or other testimony tended to support the charge of alteration, it was the duty of the court to submit the issue to the jury; but if the instrument or other proofs did not so tend, then the issue should be withheld, as in any other case where there is no testimony tending to support the allegation. No complaint is made of the action of the court in submitting the issue, and we may assume, therefore, that the appearance of the instrument does tend to support the charge of alteration. The questions as to whether there were alterations, and, if so, whether fraudulent, were fairly before the jury, and the instruments were competent evidence upon those issues. Question is made whether it was necessary for the plaintiff to offer the policy in support of his action. We think upon the pleadings it was not. The execution of the paper was not denied only in the sense that it was not the policy issued by the defendant, "for that the same has been changed and altered, without their knowledge or consent, since its delivery." This is not such a denial of the execution of the instrument as is contemplated in section 2730 of the Code. It is contended that the plaintiff, in his reply, confessed the alteration and pleaded in avoidance that it was altered before delivery. The reply will not admit of such a construction. It expressly denies alteration, and, in the sentence wherein it is claimed an avoidance is pleaded, it is said that plaintiff does not admit that any change was made. If this question rested upon the pleadings alone, we would say, under the general rule, that the burden was upon the defendant to establish his allegations that the instruments were altered after delivery, and without

its authority. We think there was no prejudicial error in admitting the instruments over defendant's objections; for, if they had not been introduced by the plaintiff, they certainly would have been introduced by the defendant in support of its defense of alteration.

II. The instrument being properly before the jury, the more important question is upon which party the burden rested of explaining the apparent alteration. Determined by the pleadings and the general rule, we have seen that the burden was upon the defendant; but, if we are to presume from the fact of alteration that it was fraudulently made, then the burden is upon the plaintiff to rebut this presumption; but if no presumption arises or if the alteration is presumed to have been made before delivery, then the burden is upon the defendant. The rule that an alteration apparent on the face of the writing raises no presumption either way is, in our opinion, well supported by reason and authority, and in harmony with the rule that the law does not presume guilt. If the instrument shows upon its face, as it is possible it may, that the alteration was fraudulent, then it proves more than the mere fact of alteration; but when the fact of alteration alone appears from it, and it is silent as to the time or authority by which it was made, there is no evidence upon which to base the presumption that it was fraudulently done. To presume against the writing, or that the alteration was before delivery, is to indulge in presumptions without evidence to support them. The alteration is not against the writing unless done after delivery, without authority. Apparent alterations are often made before delivery, and sometimes alterations are made after, with or without authority. Hence the mere fact of alteration furnishes no evidence as to when it was made, nor whether made by authority or not. If the alteration was not apparent upon inspection of the instrument, the burden of proof that it was altered would be upon the party who alleged it. If either of two opposite presumptions are equally inferable from an established

8. EVIDENCE: burden of proof.

fact, it cannot be said that that fact tends to prove either. If, from the fact of alteration, it may not be presumed that it was made after delivery, and without authority, then surely the burden of so proving is upon him who alleges it. Having determined that an alteration apparent on the face of the writing raises no presumption that it was made after delivery, and without authority, it follows, from what we have said as to the pleadings, that the burden was not upon the plaintiff to explain the alteration, but upon the defendant to prove its allegations, that the alterations were made after delivery, and without authority.

III. At the time of making this application, the plaintiff had no other insurance. The application was made to one Tam, agent of defendant, who prepared it for signature, and at the same time solicited applications in other companies in sums which, in the aggregate, exceeded twenty five hundred dollars' concurrent insurance, for which permission is given in the policy. All the applications but one were given to Tam at the same time; that one not being given then because Tam had no blank form. It was given a few days later. One of these applications was rejected by the company, and afterwards placed by Tam in another company, through its agent. There is no question but at the time of taking this application defendant's agent knew that plaintiff was desiring and applying for concurrent insurance in excess of twenty-five hundred dollars. Defendant's contention is that the plaintiff also knew that fact, and that knowledge on the part of the agent will not excuse the plaintiff's intentional fraud, even though the agent participated therein. That the defendant is bound by the knowledge obtained by its agents, is fully sustained in *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Jordan v. State Ins. Co.*, 64 Iowa, 216; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600. In each of these cases the assured possessed the same knowledge as the agent. The company, being charged with the knowledge of its agent, must be considered as having knowledge of the

3. ——: principal and agent: waiver.

amount of insurance applied for; and, having issued this policy with such knowledge, will be deemed to have waived the condition against concurrent insurance beyond the sum named. The cases last cited fully answer this contention.

IV. Under the uncontradicted testimony, there is no doubt but that notice and proofs of loss, verified by plaintiff, were sent to defendant by registered letter, and duly received. The plaintiff, having testified that the original was not in his possession or control, offered in evidence what was proven to be a copy, except that it does not set out the jurat at length. Objection was sustained, on the grounds that it was secondary, and no foundation laid for its admission. Thereupon plaintiff served notice on defendant's attorneys to produce the original, to which they replied by filing the affidavit of the defendant's secretary that, if they had the original, it was in the office at Des Moines; that they had no such paper at Mt. Pleasant (the place of the trial), and were, therefore, unable to produce it. The offer was again made, and objection sustained. Afterwards, and during the argument, the court changed its ruling, and permitted the copy to be read in evidence. The giving of notice and proof of loss is made a condition precedent by the contract. Under section 2715 of the Code, it is sufficient, in pleading performance of conditions precedent in a contract, to state generally "that he duly performed all the conditions on his part." Section 2717 requires that, in controverting such allegations, "it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." The allegation in the petition is: "Plaintiff duly gave said defendant company due notice in writing, and proof of said loss, and accompanied said notice by an affidavit stating the facts as to how the loss occurred, so far as the same was within this plaintiff's knowledge, and the extent of the loss." The answer is a denial "that he has made proof of loss, as claimed in his petition, and as

4. ——: proof of loss: evidence.

required by the contract of insurance, as contained in the policy." The only issue joined is whether notice and proof of loss were given to defendant. There is no statement of facts joining issue as to the form or sufficiency of the proof. It was competent for plaintiff to show by parol evidence that proof of loss was prepared, and sent to defendant. *Bish v. Hawkeye Ins. Co.*, 69 Iowa, 186. This the plaintiff did by proofs that are unquestioned. There being no issue as to the form or sufficiency of the notice and proof, there was no necessity for introducing evidence of the contents of either; and hence the admission of the copy could not have prejudiced any rights of the defendant, and is, therefore, not ground for reversal.

5. THE same.

V. Plaintiff was permitted to prove, over defendant's objections, that one of his attorneys wrote a letter to the defendant concerning this policy, when it would be paid, and with reference to proof of loss which had been sent. The objection was that this was giving the contents of the letter without the proper foundation having been laid for secondary evidence. The witness was not asked to, nor did he, state the contents of the letter, but only the subjects about which he wrote. Had his answer shown that it was about subjects foreign to this case, that would have been the end of inquiry; but, being upon subjects pertaining to the case, the inquiry might be pursued further. There is a difference between stating the subject upon which a letter was written and in stating its contents. The witness identified a letter from defendant, through one of its attorneys, as having been received in reply, which letter was offered and objected to. The statement that it was in answer to the former letter was not contradicted, and was corroborated by the subject-matter of the former, and the contents of the latter. This letter makes no objection to the form or sufficiency of proof of loss, but states the grounds upon which payment is refused to be the taking out of additional insurance, and other irregularities, in violation of the policy. This letter was introduced before

the court had decided to admit the copy of the proof of loss, and for the purpose of showing that the defendant made no objection to the form or sufficiency of the proof. Here again the plaintiff was offering evidence not required to sustain his cause of action; but we fail to discern wherein the admitting of that evidence could have been prejudicial to the defendant.

VI. Question is made as to whether the verdict is supported by the evidence, on the grounds that plaintiff's testimony does not show the value of the property destroyed. While it is true that the testimony is not as definite as might be desired, yet it is as much so as the circumstances will admit. Under section 1734 of McClain's Code, the amount stated in the policy is *prima-facie* evidence of the insurable value of the property at the date of the policy. The testimony is such that we would not be justified in disturbing the verdict on this ground. It was a question for the jury, and we cannot say that there was not evidence to support their finding.

6. ——: verdict of jury: appeal.

VII. In support of the claim of set-off, defendant offered in evidence the premium note set out, to which plaintiff objected, which objection was sustained. The note is an agreement to pay "one hundred and thirty-seven and forty-hundredths dollars in such portions, and at such times, as the directors of said company, agreeably to their act of incorporation and by-laws, require." It was admitted that no assessment had been made. The directors had not declared any portion of said sum as due and payable. Without now determining what the rights of the parties might be after the directors had declared a portion to be paid at the time named, we think it very clear that the defendant was not entitled to recover upon the note until such action had been taken by the directors.

7. ——: mutual companies: premium note: assessments.

Our conclusion is, upon an examination of the whole case, that the judgment of the district court should be AFFIRMED.

JOHN G. PETERS *et al.*, Appellees, v. G. P. WARNER *et al.*, Appellants.

School District: BOARD OF DIRECTORS: MANDAMUS. The board of directors of a school district will not be compelled by *mandamus* to relocate and remove a schoolhouse from one subdistrict to another, pursuant to a resolution passed by the board, upon the petition of residents of the subdistrict where such schoolhouse is situated, when the conduct of the board is in accord with the wishes of the electors of the district township as expressed at their annual meeting, and it does not appear that the petitioners will be prejudiced thereby.

Appeal from Butler District Court.—HON. JOHN B. CLELAND, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION of *mandamus* to compel the relocation of a schoolhouse. There was a trial by the court, and a judgment in favor of plaintiffs. The defendants appeal.

Hemenway & Grundy, for appellants.

O. B. Courtright, for appellees.

ROBINSON, J.—Prior to the twenty-third day of November, 1887, subdistrict number 2 of the district township of Monroe, in the county of Butler, included sections 3, 4, 9, 10, 15 and 16, and parts of 21 and 22. At the regular meeting of the board of directors held in September, 1887, the plaintiffs petitioned the board to subdivide the district in such a manner that the four sections first named should constitute one subdistrict, and the other four sections another. The board refused to grant the petition. An appeal was taken to the county superintendent, and on the day first named the action of the board was reversed,

and the district was divided, and subdistricts created as prayed. The schoolhouse of the original subdistrict was located on the northwest corner of section 15. In March, 1888, the new subdistricts voted taxes for the purpose of building a new schoolhouse in each district, and the annual district township meeting voted an additional tax for the same purpose. The amounts thus voted were two hundred dollars on each subdistrict, and six hundred dollars on the district township. The matter of disposing of the old schoolhouse was considered, but no formal action was taken in regard to it. A motion "to let the schoolhouse stand on its present site for one year in the subdistrict of the south half of subdistrict number 2 for the accommodation of district number 2, and the subdistrict of the south half" was adopted. At the regular meeting of the board held on the third Monday in March, 1888, plaintiffs petitioned the board to relocate the schoolhouse site in the south subdistrict at or near the center thereof, and to remove the schoolhouse to such site. The board denied the petition, and steps were taken to perfect an appeal from that decision. Before the time fixed for hearing the appeal, a special meeting of the board was held, its action in denying the petition to relocate was rescinded, and a committee of three persons was appointed to relocate the site, and remove the schoolhouse as prayed. The appeal was not further prosecuted.

After the annual district township meeting, a teacher was employed by the director of the south subdistrict to teach in the old schoolhouse, and a school was maintained therein for several months, and was in operation when this case was tried in the district court, for the benefit of the residents of both subdistricts. The plaintiffs, two in number, are residents of the south subdistrict, and have children of proper age to send to school. They allege that the action of the board in rescinding its action on the petition to relocate, and in appointing a committee to relocate and move the schoolhouse, was for the purpose of defeating the

appeal, and with the understanding that the relocation should not be perfected until the tax levied for the year 1888 should be collected. The prayer of the petition is as follows: "Plaintiffs demand a peremptory writ of *mandamus*, commanding said defendants to forthwith relocate said schoolhouse, and remove the same to or near the center of said subdistrict, with costs of this action." The petition does not show who the defendants are, but we infer from the prayer, and from an averment to the effect that they have failed to perform an official duty, that they constitute the board of directors of the district township of Monroe.

The electors of each district township, when legally assembled at their annual meetings, have power "to direct the sale or other disposition to be made of any schoolhouse or the site thereof, and of such other property, personal or real, as may belong to the district; to direct the manner in which the proceeds arising therefrom shall be applied; * * * to vote such tax, not exceeding ten mills on the dollar in any one year, on the taxable property of the district township, as the meeting shall deem sufficient for the purchase of grounds, and the construction of the necessary schoolhouses for the use of the district. * * * " Code, sec. 1717. It is the duty of the board of directors to "make all contracts, purchases, payments and sales necessary to carry out any vote of the district." Code, sec. 1723. It is also their duty to provide a school in each subdistrict for at least twenty-four weeks in each year, unless relieved by the county superintendent. Code, sec. 1727.

It will be observed that the directors provided a school in the subdistrict in which plaintiffs reside. They complain because the board did not provide one in the north subdistrict, but they have failed to show themselves in any manner interested in such a school. When the district township meeting authorized the construction of two schoolhouses in March, 1888, there was no money in the schoolhouse fund, the contingent fund was largely overdrawn, and the schoolhouse could

be moved or a new one built only by incurring a debt in anticipation of the taxes which would be available in the year 1889. It has been held that a board of directors may incur a debt on account of the district township in advance of the collection of taxes, to carry out a vote of the annual meeting. *Austin v. District Township of Colony*, 51 Iowa, 102. In this case the building of two schoolhouses was authorized, but the meeting did not in terms direct or authorize the board to anticipate the revenue, and incur a debt by constructing schoolhouses at once. On the contrary, the action of the meeting was in effect a direction to the board not to remove the old schoolhouse for one year, but to use it for the benefit of the two new districts. It may be conceded that the meeting had no power to prevent the establishing of a school in the north subdistrict, and that the power to fix and relocate schoolhouse sites is vested in the board. Code, secs. 1727, 1724. But the action of the township meeting contemplates some disposition of the old schoolhouse, other than its removal to a new site, and was within the power conferred by statute. Code, sec. 1717. It is clear that the board were not required to move the house to a new site by any vote of the district. It is shown that the house was old with rotten sills, and joists in bad condition; that it could not be moved with advantage; that it was of little value to move; that it could not be moved along the highway, and should not be moved through the fields in any event unless the crops were harvested and the ground frozen. The board are carrying out the wishes of the electors of the district township as expressed at their annual meeting. All persons in interest appear to be satisfied with the arrangement adopted excepting plaintiffs, and their children can reach the schoolhouse by traveling one and one-fourth miles. The committee of the board desired to locate the new site a mile south of the present one, but there are objections which may cause a place eighty rods further north to be selected. Negotiations were being

carried on with respect to that place, and the matter of the new site is not fully determined. While it is true that the board of directors are required to locate the schoolhouse with respect to the geographical position and convenience of the people, the exercise of that power involves a discretion on the part of the board, and it is proper for them to take into consideration the condition of the district funds, the difficulty and expense of relocating the schoolhouse, and the convenience and best interests of all persons concerned. We do not discover any abuse of discretion in this case. On the contrary, we are satisfied that the board have acted in good faith in the discharge of their duties. It may be that their action in rescinding the refusal to relocate, and in appointing a committee was done with the purpose charged, but that is immaterial so long as their object was entirely proper and within the scope of their powers. We must presume from the facts shown, that had the action not been rescinded it would have been affirmed by the county superintendent had the appeal been perfected.

The judgment of the district court is REVERSED.

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O. C. McINTOSH, Administrator, Appellant, v. H. G. WILSON, Sheriff, Appellee.

1. **Sale of Personal Property**: POSSESSION: RECORDING: EXECUTION. A son purchased, with money loaned him by his father, a one-half interest in a stock of merchandise. Afterwards, by written agreement, he relinquished all interest in the property to the father, but providing that he should continue to conduct the business, and should become owner of one-half of the same when payment of an amount stated should be made. This agreement was not recorded, and the son continued in possession of the property. An execution having been levied upon the property to satisfy a judgment against the son, the father sought to recover the same by replevin. *Held*, that, in the absence of actual knowledge of the above agreement before the levy, one-half of the interest in the property was subject to the execution.

2. ——: PHARMACY LAW: EVASION: ESTOPPEL. Where the owner of a stock of merchandise transferred the same to another, to be held and treated by him as its ostensible owner, for the purpose of

evading the law relating to registered pharmacists, and the property is levied upon under execution as that of the person so in possession, the real owner will be estopped from claiming any title thereto.

Appeal from Wright District Court.—HON. D. R. HINDMAN, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION to recover the possession of specific personal property. After the evidence was fully submitted a verdict for the defendant was returned by direction of the court, and a judgment rendered thereon. The plaintiff appeals.

R. M. Wright, for appellant.

Martin & Wambach, for appellee.

ROBINSON, J.—In June, 1882, Alexander Latter and Dr. Brackett owned and conducted a drugstore at Goldfield, Iowa. In the month named Latter sold an undivided one-half of the stock of goods and business to N. M. Melrose and Dr. Morse, and Dr. Brackett sold to them one-third of his share, so that each of the three persons last named owned one-third of the property, and the business was carried on by them as copartners for a time. Dr. Morse made no payment for his share, and after a few months withdrew from the firm. After his withdrawal the business was carried on by N. M. Melrose and Dr. Brackett until October, 1883, their interests in the property being equal. On the date last named Dr. Brackett sold his interest to William Melrose, the father of N. M. Melrose. The latter had paid four hundred dollars on account of his purchase. That amount and whatever sums in addition he put into the business were loaned him by his father. When Dr. Brackett withdrew, an arrangement was made which is stated by the son as follows: "I told father that I did not think I would be able to handle half of it, and proposed that he should buy out Brackett,

assume my indebtedness, and I would run the business in my name. He bought out Dr. Brackett's business, and assumed my debts, and I took charge of the business in my name. It was because I held a retail tobacco and liquor license, and also because by father was debarred by the pharmacy law from running a drug-store." On January 1, 1885, the father and son signed an agreement in words as follows: "It is hereby agreed between Wm. Melrose and N. M. Melrose shall take charge of the drug business of William Melrose in his building in Goldfield, Iowa, and do all the business, buying, selling, etc., and shall receive one-half of the profits for his services, and whenever, he, N. M. Melrose, shall pay to me, Wm. Melrose, one-half of the amount paid by me for said drug stock, etc., he shall become owner of one-half the business." In January, 1886, a new agreement was made by which the son was to receive thirty dollars per month for his services. He testifies that he then abandoned his plan of buying an interest in the property, but the business was carried on as before. The father was in the store a large part of the time, and gave some directions as to what should be done.

On the twenty-third day of March, 1883, Root Bros. obtained a judgment in the district court of Hamilton county against N. M. Melrose for one hundred and twenty-five dollars and eight cents' damages, and twenty-two dollars and thirty cents' costs. On the twenty-eighth day of March, 1886, the sheriff of Wright county received an execution, issued to satisfy said judgment, and upon the same day levied it upon the stock of goods which was used in the business carried on in the name of the son, and claimed by the father, as already stated. Its admitted value is three hundred dollars. This action was commenced by William Melrose to recover the goods. Before the trial, his death was suggested, and his administrator was substituted as plaintiff. Judgment was rendered in favor of defendant, the sheriff of Wright county, for the amount required to satisfy the execution.

I. The evidence shows that N. M. Melrose owned one-half of the stock and business, from the time Dr. Morse retired until October, 1883, when Dr. Brackett sold to plaintiff's intestate. The fact, that all the money he had paid on account of the business was furnished by his father, did not alter his legal relation to the property. The arrangement, by which his father was to assume his debts and take the property, was not made of record by an instrument in writing duly recorded, as provided by section 1923 of the Code. The son remained in possession and carried on the business after the arrangement was made, the same as before. It does not appear that defendant had any knowledge of the agreement, and we conclude there was not such a transfer of one-half the property in controversy, as would defeat the levy of defendant, but that it could be enforced to that extent by proper proceedings.

1. SALE of personal property: possession: recording: execution.

II. A more serious question is presented as to the remainder of the property. The judgment which the defendant seeks to collect was rendered when the business was owned and carried on by N. M. Melrose and Dr. Brackett, and before plaintiff's intestate had acquired any interest in it. It is not shown when the debt upon which it was rendered was contracted, but there is nothing in the record to justify the presumption that credit was given to the debtor, on account of any interest he appeared to have in the property in question. Therefore, there is no ground for holding that plaintiff's intestate had so conducted himself with reference to the property as to mislead Root Bros. to their prejudice in the creation of the debt. It clearly appears, however, that the father authorized his son to remain in possession and control of the property, and to conduct the business in his own name for an unlawful purpose.

2. ——: pharmacy law: evasion: estoppel.

Chapter 75 of the Acts of the Eighteenth General Assembly makes it unlawful for any person, not a

registered pharmacist, to conduct such a business as that carried on by the son. It was held in *State v. Norton*, 67 Iowa, 641, that the one who conducts a drugstore is the proprietor within the meaning of the act. The father could not become a registered pharmacist under the provisions of the act; and, to avoid the requirements and penalties provided by law, he arranged for his son to claim and appear to be the actual owner. Appellant contends that there was not, in fact, a conveyance of the property by the father to the son, and that the former would not have been estopped to assert his title as against the world, excepting claimants for a violation of laws regulating the practice of pharmacy, and the sale of intoxicating liquors. We do not think the claim can be sustained. The father clothed the son with all the visible badges of ownership, and authorized him to declare himself the owner for the purpose of violating the law. Contracts made in violation of law will not be enforced. *Caldwell v. Bridal*, 48 Iowa, 16; *Reynolds v. Nichols*, 12 Iowa, 403; *Lemon v. Grosskopf*, 22 Wis. 451; 3 Am. and Eng. Ency. of Law, 869, 872 and notes. "Contracts intended to promote or requiring the performance of acts forbidden by statute are void." *Dillon v. Ellen*, 46 Iowa, 300. A sale and delivery of property on Sunday is illegal, and in such a case the law will not enforce the agreement, but will leave the parties where it finds them. *Kinney v. McDermot*, 55 Iowa, 674; *Pike v. King*, 16 Iowa, 49. The property in controversy having been transferred to the son to be held and treated by him as its ostensible owner to accomplish a purpose prohibited by law, the father lost the right to reclaim it by law. It could have been used by the son for his own purposes, including the payment of his debts, and it was, therefore, subject to legal process in favor of his creditors. As the father claimed to own all the property, what we have said on this branch of the case applies to all.

The judgment of the district court is AFFIRMED.

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GEORGE E. CROW, Appellant, v. W. H. BROWN *et al.*, Appellees.

Pension Money: PROPERTY PURCHASED THEREWITH: EXECUTION: EXEMPTION. Real estate purchased by a pensioner with pension money, received from the federal government, is exempt from levy and sale under execution, under the provisions of section 4747 of the Revised Statutes of the United States. (*Overruling prior decisions.*) [ROBINSON, J., *dissenting.*]

Appeal from Adams District Court.—HON. R. C. HENRY, Judge.

FRIDAY, OCTOBER 24, 1890.

THIS is an action in equity by which the plaintiff seeks to enjoin the sale of certain real estate upon an execution against him, and in favor of the defendant Brown, upon the ground that the said real estate is exempt from execution and sale. There was a demurrer to the petition, which was sustained. The plaintiff appeals.

Davis & Wells, for appellants: To exempt future acquisitions is recognized as a state's right in all the cases. *Edwards v. Kearzey*, 94 U. S. 595; *Gunn v. Barry*, 15 Wall. 610. The pension law (Statutes, U. S., sec. 4747), enacted in 1866, protects pension money from seizure for debts until it is paid into the hands of the pensioner, and then provides that such pension money "shall inure wholly to the benefit of such pensioner." In *Goble v. Stevenson*, 68 Iowa, 270, this court held, that after chapter 23, Acts of 1884, took effect, "any pensioner might make a gift of his pension money, and the donee might hold the same, or property purchased therewith, as against the donor's creditors." The majority opinion in *Foster v. Byrne*, 76 Ia. 295, is in conflict with that case; for, if the exemption act is unconstitutional, then a donation of pension money could be followed

into the donee's hands. The lexicon definition of the noun "benefit" is "profit," "advantage," "whatever promotes personal happiness." "Wholly for the benefit of such pensioner," means "for his own personal happiness." To "pay a debt" means to confer a benefit upon another, in discharge of an obligation. To pay always means sacrifice to the debtor and benefits to the creditor. *Hissem v. Johnson*, 27 West Virginia, 644, expressly holds that the "benefits" of pensions are carefully guarded by federal statutes for the use of the pensioner and his family, not only by section 4747, United States laws, but that said section is made plain by sections 4703, 4745, 4746, 4785 and 4786, to be construed therewith. *Eckert v. McKee* is still authority, unless overruled by *Robion v. Walker*, 82 Ky. 60. If the statute, section 4747, had no other purpose than to exempt the pension money while in transmission from the officers and agents of the government to the pensioner, no such statute was needed. *Buchanan v. Alexander*, 4 How. 20; *Elwin's Appeal*, 67 Pa. St. 367; *Heywood v. Clarke*, 50 Vt. 617. The right to enforce payment of a pre-existing debt out of pension money, subsequently received, does not enter into the obligation of a contract creating such pre-existing debt. *Hissem v. Johnson*, 27 W. Va. 652; *Kellogg v. Waite*, 12 Allen, 530; *United States v. Hall*, 98 U. S. 349. This court held, in *Babcock v. Gurney*, 42 Iowa, 154, that the legislature could change the remedy and remedial proceedings as to existing judgments, and in *Kossuth County v. Wallace*, 60 Iowa, 508, it held that if existing remedies are not destroyed a pre-existing contract is not affected. And in *Maltby v. Cooper*, Morris, 59, it is held, that the legislature may completely bar a particular action as to existing contracts, if a substantial remedy is left. Congress did not intend to appropriate money to pay off creditors of the pensioners. The act of 1884 prevents the diversion of the pension fund exactly as congress intended. We rely upon *Heywood v. Clarke*, 50 Vermont, 613; *Hissem v. Johnson*, 27 W. Va. 644; *Folschow v. Werner*,

51 Wis. 85; *Farnum v. Turner*, 64 Iowa, 690; *Goble v. Stevenson*, 68 Iowa, 270; *United States v. Hall*, 98 U. S. 343; *Eckert v. McKee*, 9 Bush, 355.

Dale & Brown, for appellees: Is chapter 23, Twentieth General Assembly, 1884, unconstitutional and void as to pre-existing debts? The question was determined by this court after full argument and reargument on rehearing in *Foster v. Byrne*, 76 Iowa, 295. The principle of "*stare decisis et non quieta movere*," has been recognized and followed by this court since its foundation, and it is in cases determined by a divided court that it is particularly necessary to invoke and be governed by this principle. *Stout v. Insurance Co.*, 12 Iowa, 386-7; *Longhurst v. Insurance Co.*, 19 Iowa, 370-2; *Moingona Coal Co. v. Blair* 51 Iowa, 447; *Lewis v. Soule*, 52 Iowa, 11-14; *Zent v. Picken*, 54 Iowa, 538; *Bullis v. Marsh*, 56 Iowa, 751; *Monk v. Corbin*, 58 Iowa, 505; *Ex'r of Griffith*, 64 Iowa, 197; *Maxwell v. Hunter*, 65 Iowa, 124; *Adams v. Griffin*, 66 Iowa, 127. The dissenting opinion in *Foster v. Byrne* shows that the dissenting judges do not attempt to sustain the constitutionality of chapter 23, Twentieth General Assembly, but rest their decision on their construction of Revised Statutes, United States, section 4747. Does chapter 23, Laws, 1884, violate these constitutional provisions? The determination of that question involves another: Is a law exempting from execution property that was liable at the time the contract was executed an impairment of the contract? That it is, see *Triplet v. Graham*, 58 Iowa, 135; *Goble v. Stephenson*, 68 Iowa, 270; *Edwards v. Kearzey*, 96 U. S. (6 Otto) 595; *Gunn v. Barry*, 82 U. S. (15 Wall.) 610-625; *Walker v. Whitehead*, 83 U. S. (16 Wall.) 314-318; *Wilson v. Brown*, 58 Ala. 62. "Even as to property acquired by the debtor after the act was passed." *Johnson v. Fletcher*, 54 Miss. 628; *The Homestead Cases*, 22 Gratt. 266. Also, that laws are void which substantially impair the

remedy, see *Jones v. Brandon*, 48 Ga. 593; *Lessley v. Phipps*, 49 Miss. 790; *Parvey v. Wickham*, 23 Mo. 112; *Kibby v. Jones*, 7 Bush, 243; *Berry v. Ewing*, 3 S. W. Rep. 877; *State of Louisiana ex rel. Fisk v. Police Jury of Jefferson*, 116 U. S. 135–137. A law reducing the limit of taxation of a municipal body is void as to the pre-existing contracts of such municipal corporation. *State of Louisiana v. Police Jury, St. Martin's Parish*, 111 U. S. 716–722. The following cases announce the same doctrine: *Van Hoffman v. Quincy*, 71 U. S. (4 Wall.) 535; *State of Louisiana v. New Orleans*, 102 U. S. (12 Otto) 203–7; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, and several cases collated and cited in 47 U. S. (6 How.) 328. A stay law enacted after the contract is made is unconstitutional. *Webster v. Rose*, 6 Heisk. 93. Extending time of redemption on foreclosure of a mortgage is held unconstitutional as to prior contracts. *Bronson v. Kinzie*, 42 U. S. (1 How.) 311; *Maloney v. Fortune*, 14 Iowa, 417; *Cagill v. Bower*, 1 Mich. 369. Laws requiring property to be appraised, and sold at not less than two-thirds the appraisement, held void as to pre-existing contracts. *Bronson v. Kinzie*, 42 U. S. (1 How.) 311; *McCracken v. Hayward*, 42 U. S. (2 How.) 608; *Wilard v. Longstreet*, 2 Doug. (Mich.) 172; *Rosier v. Hale*, 10 Iowa, 470. Every debt, then, created by contract prior to the passage of any homestead or exemption law, is privileged from the operation of such law. Thompson on "Homesteads and Exemptions," sec. 291. Is real estate purchased solely with pension money exempt from execution under Revised Statutes, United States, section 4747? This section was first construed by this court in June, 1882, in the case of *Webb v. Holt*, 57 Iowa, 712. The rule established upon the authority of that decision has been followed in the following cases: *Triplett v. Graham*, 58 Iowa, 135; *Goble & Co. v. Stephenson*, 68 Iowa, 270; *Baugh v. Barrett*, 68 Iowa, 495; *Foster v. Byrne*, 76 Iowa, 295. In the latter case Justices ROTHROCK and BECK dissent, as to

the construction of section 4747. During this period, Judges DAY, ADAMS, SEEVERS, REED and ROBINSON have concurred in the majority opinion, at different times. This question has been determined in accordance with the holding of the majority in *Webb v. Holt*, *supra*, by the following state supreme courts. *Kellogg v. Waite*, 12 Allen (Mass.) 529; *Spelman v. Eldridge*, 126 Mass. 113; *Robin v. Walker*, 82 Ky. 69; 56 Am. Rep. 878; *Eckert v. McKee*, 9 Bush (Ky.) 355; *Sirus v. Walsham*, 7 S. W. Rep. (Ky.) 557; *Jardain v. Fairton*, S. F. A. 44 N. J. Law, 376; *Cavanaugh v. Smith*, 84 Ind. 380; *Cranz v. White*, 27 Kan. 319; *Friend v. Garcelon*, 77 Me. 25; *Hissem v. Johnson*, 27 W. Va. 644; *Rozelle v. Rhodes*, 9 Atl. Rep. (Penn.) 160. The case of *Eckert v. McKee*, 9 Bush, 355, has been overruled by the supreme court of Kentucky, in the cases of *Robin v. Walker*, 82 Ky. 60, and *Sirus v. Walsham*, 7 S. W. Rep. 557. The state supreme court of Wisconsin, in *Folschow v. Weiner*, 51 Wis. 85; 7 N. W. Rep. 911, decided in 1881, maintains the doctrine contended for by appellant; this is the only state so construing this statute. The only United States supreme court case bearing on this question is the case of *United States v. Hall*, 98 U. S. 343–358. The proceeds or investments of exempt property are not exempt. The rule in this state is that money or property, the proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt from execution. *Friedlander v. Mahoney*, 31 Iowa, 311; *Harrier v. Fassett*, 56 Iowa, 264. That exemptions are purely the creation of statute, which only exist under explicit provisions, see *Van Dorn v. Marden*, 48 Iowa, 188; *Rogers v. Raiser, Sheriff*, 60 Iowa, 355. Congress has no power to exempt pension money after payment to the pensioner. *Webb v. Holt*, *supra*; *Cranz v. White*, 27 Kan. 319; *Friend v. Garcelon*, 77 Me. 25; *Hissem v. Johnson*, 27 W. Va. 644; *Fink v. O'Neil*, 106 U. S. (16 Otto) 272; *Bowman v. Railway Co.*, 125 U. S. 465; *Spindle v. Shreve*, 111 U. S. 542. Appellant refers to legislation of congress granting

public lands on various conditions. The whole subject-matter of the public lands is, by constitution United States, article 4, section 3, placed under the control and disposal of congress. *United States v. Gratiot*, 39 U. S. (14 Pet.) 537. The words "public lands" describe such lands subject as are to sale or other disposal under general laws. *Newhall v. Sanger*, 92 U. S. 761. As to other lands or property owned by the United States within a state the United States has only the right of an ordinary proprietor. *Ft. Leavenworth Ry. Co. v. Lowe*, 114 U. S. 525; *Miner's Bank v. State of Iowa*, 53 U. S. (12 How.) 4.

ROTHROCK, C. J.—I. In the month of October, 1875, the defendant Brown recovered a judgment against the plaintiff for the sum of four hundred dollars and costs. At that time the plaintiff was insolvent. The plaintiff was a soldier in the war of the rebellion, and in the month of October, 1886, he received a pension from the United States on account of physical disability incurred while in the military service. He was allowed and paid the sum of fourteen hundred and forty dollars as arrears of pension. Upon receiving the said sum of money he bought one hundred and twenty acres of land, for which he paid out of said pension money the sum of five dollars an acre. He built a house on said land into which he moved his wife and family, and has since occupied the premises as a homestead. On the eighteenth day of May, 1889, the defendant Brown caused an execution to be issued on said judgment, and levied on the land, and by this action the plaintiff seeks to restrain the defendant Pomroy, who is sheriff, from selling the land in satisfaction of the judgment.

In the case of *Webb v. Holt*, 57 Iowa, 712, it was held that pension money was exempt from the payment of the debts of the pensioner while it was in course of transmission to him, but not after it came into his possession. This construction of section 4747 of the Revised Statutes of the United States was adopted by a majority of this court. The same principle has since been adhered

to in the cases of *Triplett v. Graham*, 58 Iowa, 135; *Baugh v. Barrett*, 69 Iowa, 495; *Farmer v. Turner*, 64 Iowa, 690, and in *Foster v. Byrne*, 76 Iowa, 295. In the first and last of the cited cases Mr. Justice BECK and the writer hereof dissented from the opinion of the majority. No formal dissent was entered in the other cases. Since the final opinion was filed on rehearing in the case of *Foster v. Byrne* the *personnel* of this court has been changed, and upon a full examination of the question a majority of the court are of the opinion that the property purchased with pension money is exempt from execution or attachment under the act of congress above cited. The reasons for such holding are fully set out in the dissenting opinions above referred to, and need not be repeated here. It is sufficient to say that if force and effect is to be given to that clause of the act of congress which provides that pension money "shall inure wholly to the benefit of the pensioner," to the exclusion of his creditors, there appears to us to be no escape from the conclusion that the property purchased with pension money is exempt. Any other construction of the law would permit creditors to subject the money as soon as it reaches the hands of the pensioner.

It is correct as claimed by counsel for appellees that the weight of authority is contrary to our present holding. But courts are not always controlled by the weight of authority. If they were, the duties of courts of last resort would be simply to ascertain the number of cases involving the question, and follow the majority. There is the other important consideration that the weight of authority should commend itself to the judgment and conscience of the court having before it the question for determination.

If the rule adopted by this court heretofore were such as that rights may have accrued by reason of the rule, whereby the law as declared has become what is known in the law as a rule of property, we might well hesitate to overrule the cases above cited. But no such a result will follow our present holding. The relation of the creditor of the veteran pensioned soldier has

been in no sense changed by the decisions of this court. The defendant in this action has not extended credit to the plaintiff by reason of the former decisions of this court.

The decree of the district court is REVERSED.

ROBINSON, J. (*dissenting*).—It is true that courts are not always controlled by the weight of authority, but when numerous courts of high standing have duly considered a statute, and all but one or two agree as to its intent and scope, one of the courts so agreeing should not overrule its decisions, and adopt a different view of the statute except for reasons of controlling force. In cases of doubt, it is usual and proper to give great consideration to the weight of authority. The section of the federal statute construed in the foregoing opinion is as follows: "No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatsoever, whether the same remains with the pension office, or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner."

The exemption applies in terms only to money due or to become due, and there is no suggestion in the statute that it is designed to apply to any other kind of property. The exemption applies only to such money, "whether the same remains with the pension office, or any officer or agent thereof," the clause quoted necessarily controlling and limiting the effect of the clause of the section immediately following. That is not peculiar to the statute under consideration, but has been frequently incorporated in substance and effect in acts of congress relating to pensions. It has heretofore as a rule been considered as designed to exempt the pension from the seizure for liabilities of the pensioner until it should be received by him. Had it been the intent of congress to exempt not only the money, but also all property in which it should be invested, such intent could readily have been expressed in language which would have left no room for doubt. To give the

statute the effect ascribed to it by the opinion of the majority required the interpolation of words which congress deemed it proper not to use.

It was said in *Rozelle v. Rhodes*, 116 Pa. St. 129, 134, that "the exemptions provided by statute, upon any fair and reasonable construction, will only protect the fund whilst it is in course of transmission to the pensioner; after that it is liable to seizure as other money." In *Friend v. Garcelon*, 77 Me. 25, it was said, "The question is, whether this provision furnishes any protection to or exemption of the money after it comes into the pensioner's hands? A careful examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended so long as the pension remains in the pension office or its agencies, or is in the course of transmission to the pensioner. It is money 'due,' or to 'become' due,' and not money collected, that is protected by the law. By another provision of the federal statutes, a pensioner is not allowed to pledge or sell any right or interest in his pension. The extent of all the interference of the government seems to be to insure the actual reception of its bounty by the person entitled to it. When the money is actually in the possession of the pensioner the protection is gone." That doctrine is adhered to in *Crane v. Linnens*, 77 Me. 59, 61. In *Cranz v. White*, 27 Kan. 319, it was said that the protection afforded by the statute was to an undelivered sum of money, and that the clause "but shall inure wholly to the benefit of such pensioner" is qualified by, and must be read in the light of, the preceding words of the section, and that it "applies to money due, or to become due, and not to money paid in and in possession." It was further said that "nowhere in the section is there reference to pension money in the hands of the pensioner. It does not purport to exempt money in such hands from the operation of state laws, either those of taxation, or the ordinary statutes concerning exemptions and indebtedness." The construction adopted in the

foregoing cases has been approved in the following: *Jardain v. Savings Fund Ass'n*, 44 N. J. L. 376; *Robion v. Walker*, 82 Ky. 60; *Faurote v. Carr*, 108 Ind. 123, 126; *Spellman v. Aldrich*, 126 Mass. 113, 117; *Hissem v. Johnson*, 27 W. Va. 652; *Stockwell v. Bank*, 36 Hun, 583. The doctrine of the majority opinion was approved in *Folschow v. Werner*, 51 Wis. 85, 87, and, so far as I am aware, it has been approved by no other court of last resort, although something in the nature of *dictum* was said in approval in *Hayward v. Clark*, 50 Vt. 612, 617. It is interesting to note in this connection that the only case cited by the supreme court of Wisconsin to support its views is *Eckert v. McKee*, 9 Bush (Ky.) 355 That case so far as it supports the doctrine of the Wisconsin court was overruled by the court which decided it in *Robion v. Walker*, *supra*. It has been held that, before the pension check is cashed, it so far represents money in the course of transmission that it may be disposed of by the pensioner, and the pension money thus be placed beyond the reach of creditors of the pensioner. *Farmer v. Turner*, 64 Iowa, 690; *Hissem v. Johnson*, *supra*; *Hayward v. Clark*, *supra*.

The appellee contends that congress has no power to exempt from execution pension money after its payment to the pensioner. That power was questioned in *Webb v. Holt*, 57 Iowa, 712, 716; in *Hissem v. Johnson*, *supra*, and in *Cranz v. White*, *supra*. It was referred to, but not determined, in *United States v. Hall*, 98 U. S. 343; that case going no further than to hold that congress may enact laws to protect pension money until it shall have passed into the hands of the pensioner. The power to enact laws which shall have the effect necessarily given to the section under consideration by the opinion of the majority is not expressed in the constitution, and if possessed by congress it is an implied or incidental power. In the view I take of the statute it is not necessary to determine whether that power exists, but the fact that if exercised it would create in many, if not all, the states a new class of exemptions, and would be

contrary to the general policy of congress not to interfere unnecessarily with the domestic affairs of the several states, is an additional reason in favor of the conclusion that congress did not intend to exempt property in the hands of the pensioner purchased with pension money from liability for his debts; but did intend to leave the matter of creating such exemptions to the discretion of the state legislatures. Happily, the general assembly of Iowa, by chapter 23 of the Acts of the Twentieth General Assembly, has extended the protection provided by congress to investments made by the pensioner, and the question involved in this case will be of interest in comparatively few cases. Believing as I do, however, that the construction of the federal statute adopted by the majority is not sanctioned by the rules of construction, and that it does not effectuate the intent of congress, I cannot but dissent from their opinion. Certainly the prior decisions of this court should not be overruled, and the great weight of authority disregarded, unless for reasons so convincing as to leave little room to doubt the correctness of such a course, and this does not seem to me to be a case of that kind. In my opinion the judgment of the district court should be affirmed.

E. G. KEMPER, Appellant, v. THE CITY OF BURLINGTON, Appellant.

1. **Municipal Corporations**: INCUMBRANCE OF STREETS: REPAIRS: EVIDENCE. In an action by one, who had deposited rock in a city street, to recover of the city the value of such rock, which it was alleged had been used by the city in the repair of the street at the point of such deposit, the plaintiff introduced in evidence a resolution of the city council, passed the year before the appropriation of material complained of, and directing the street commissioner to repair the street in question. *Held.* that the evidence was competent upon the question whether the city authorized the repair in which the material was used, and the question whether it related to the repair in controversy was for the jury to determine.

2. ——— : ——— : ——— : ———. The city having used the material thus incumbering the street in part for the purpose of repairing the same, and in part to clear the street of the incumbrance, *held*, that the city was not entitled to recover for the cost of removing the incumbrance, and was liable for the value of the material used, where and as it was, above the cost of its removal.

3. ——— : ——— : NOTICE TO REMOVE : ABANDONMENT. Whether a failure to remove an obstruction from the streets of a city within a reasonable time after notice from the city will constitute an abandonment of such obstruction, depends upon the attending circumstances of each particular case, and is a question for the jury.

4. ——— : ——— : ——— : ———. The defendant asked an instruction to the jury, that if plaintiff failed to remove the obstruction in the street when notified to do so, the city might abate the nuisance, and it would not be liable to plaintiff for having abated it in the most advantageous manner, namely, using the obstructing material in the repair of its streets. *Held*, that in the absence of any showing that the plaintiff had abandoned the material, or that defendant's disposition of it was simply for the purpose of removing the obstruction, the instruction was properly refused.

5. ——— : REMOVAL OF OBSTRUCTIONS BY CITY. A city is entitled to the full width of its streets, and is charged with the duty of keeping the same in good repair and reasonable condition, and has the right to remove any obstruction found upon any part of its streets, put there without its authority.

6. ——— : ——— : SPECIAL FINDINGS : GENERAL VERDICT. Where the general verdict returned by the jury is for a smaller sum than what would seem to be warranted by its special findings, it will not be set aside as inconsistent with the latter where, under the evidence, the jury may have based its verdict upon its findings of facts not covered by its special findings.

Appeal from Des Moines District Court.—HON. J. M. CASEY, Judge.

FRIDAY, OCTOBER 24, 1890.

ACTION to recover for a quantity of rock used by the defendant in repairing one of its streets. The case was tried to a jury, and a general verdict in favor of the plaintiff, with certain special findings, returned. Plaintiff moved for judgment on the special findings for one hundred and thirty-four dollars, and the defendant for judgment against the plaintiff for costs, which motions,

together with defendant's motion for new trial, were overruled, and both parties appeal.

T. B. Snyder and *A. H. Stutsman*, for appellant, E. G. Kemper.

Seerley & Clark, for appellant, the City of Burlington.

GIVEN, J.—I. The following statement of facts as they appear in the testimony, with but little, if any, controversy, will be sufficient to an understanding of the questions discussed. The plaintiff, in working a stone quarry on the face of a bluff above one of defendant's streets, known as "Bluff road," caused rock and refuse from his quarry to roll down the face of the bluff, some of which lodged on the bluff before reaching the road, some lodging in the road, and some, breaking through a fence maintained by the defendant on the lower side of its road for the protection of travel, lodged below. In blasting in the quarry, it occasionally happened that rock, suitable for building purposes, was thrown down the bluff, and lodged at different places. There is some controversy as to the extent to which the road was obstructed by this material, but no question but that it was a hindrance to travel. It appears that the defendant caused notice to be given to the plaintiff on several occasions to remove the obstruction. It also appears that the plaintiff sent his workmen on different occasions to clear the road, and that they did so by rolling the stone out of the traveled track to the edge of the grade cut along the face of the bluff, which was twenty-five feet wide. The road at this point was for several hundred feet upon wet ground, and difficult to keep in repair. The officers of the city charged with such matters, in repairing the road, took the rock and refuse that had been rolled from plaintiff's quarry, and spread it upon the road, filling up the mudholes, and otherwise improving the road. Many of the rock, suitable for

1. MUNICIPAL corporations: incumbrance of streets: repairs: evidence.

building purposes, had lodged in the mudholes, so that it was impracticable to remove them. In making the repair, rock was gathered from the face of the bluff above the road, within the limits of the highway, and some from points above the limit of the highway. Plaintiff's contention is that the material thus used by the defendant was his property, was valuable, and was appropriated by the defendant. The defendant's contention is, that the material was valueless; that, by placing it on the highway and allowing it to remain, the plaintiff had abandoned it; that the disposition made of it by the defendant was solely for the purpose of removing the obstruction to the highway; that, in allowing the rock to roll down the bluff, plaintiff broke defendant's fence, and that it was reasonably worth three hundred dollars to repair the fence, and remove the obstruction from the road.

On the trial, the court permitted the plaintiff to introduce a resolution passed by the city council May 18, 1882, directing the street commissioner to repair Bluff road. The contention is that this resolution did not relate to the repair in the making of which the material in question was used. The commissioner testified that he had repaired the road under that resolution in 1882. There was an issue as to whether the city had authorized the repair in which the material was used, and it was for the jury to say whether this resolution related to that repair made in 1883, or whether the authority of the resolution had been exhausted by the repair in 1882.

II. Defendant offered evidence as to the reasonable value and expense of removing the obstruction, to which plaintiff's objection was sustained.

2. THE same.

It is the duty of the city to keep its streets free from obstructions that hinder or are dangerous to travel. It is not questioned but that, if the plaintiff obstructed the road and failed or refused to remove the obstruction, and the city did so, he would be liable to the city for the reasonable expense of the removal.

Had the city taken and carried so much of this material as was an obstruction to travel to another place, the plaintiff would have been liable for the expense thereof, as it is apparent that he had been notified to remove the obstruction, and had failed to do so. Such, however, is not this case. The defendant did not remove the material forming the obstruction to another place, but broke it up and spread it upon the road as an improvement thereof. Certainly, the city was not entitled to the reasonable cost of removing the rock as if it had been taken to another place. It is true that in using the material as it did the city removed the obstruction to travel, but did not remove the material in the sense of taking it to another place. If the removal of the obstruction had been the only purpose in the disposition made of the material by the defendant, and that was a reasonable way of removing the obstruction, then the city would have been entitled to the expense thereof. For instance, if it was more economical to dig holes in the ground and bury the material forming the obstruction than to remove it to another place, and the city had proceeded thus to abate the obstruction, it would be entitled to the reasonable expense of doing so. It appears, however, that an abatement of the obstruction was not the only purpose in the disposition made of the material; the betterment of the road was no doubt one of the purposes. If the material had fallen upon a part of the road not requiring repair, so as to obstruct travel, and the defendant had removed and used it in the repair of a different part of its road, the plaintiff would be entitled to recover the value of his rock, if it had not been abandoned, less the cost of removal. But in this case there was no cost of removal.

There was a direct issue as to the value of the material where and as it was; not its value to the defendant, but its market value. A person purchasing it must do so subject to the liability to remove it or pay for its removal. Its value, therefore, was just what it was worth where and as it was, over and above the cost

of removal. If it would not bear the expense of removal, then it had no value. By thus estimating the value, the defendant is made to pay for just what it received. There was no error in excluding this testimony, nor in withdrawing defendant's counterclaim for expense in removing the rock alleged to have been an obstruction to the road.

III. The defendant asked the court to instruct the jury that, if the plaintiff failed to remove the obstruction after being notified to do so within a reasonable time, he thereby abandoned the stone, and could not recover therefor. The question of abandonment was one of fact and for the jury. A failure to remove the obstruction after notice would not, of itself, be an abandonment. Whether a failure to remove the obstruction after notice would be an abandonment must depend upon the attending circumstances, and must be determined by the jury.

3. —: —: notice to remove: abandonment.

IV. The defendant complains of the refusal of the court to instruct that if the plaintiff obstructed the road, and did not remove the obstruction when notified to do so, the city was empowered by law to abate the nuisance, and, if it abated it in the most advantageous manner, that the defendant is not liable to the plaintiff. There was no error in refusing this instruction. As already stated, the removal of the obstruction was not the only purpose of the defendant in disposing of the rock as it was disposed of. The repair of the street was evidently one of the purposes, and, though that was the most advantageous manner of removing the obstruction, yet if the rock had a value where and as it was, and the plaintiff had not abandoned it, he was entitled to that value.

4. THE same.

V. The defendant complains of the fifth paragraph of the instructions wherein the court says the city had the right to the whole width of its streets, and was charged with the duty of keeping the same in good repair and reasonable condition, and had the right to remove any rock or material found upon any part of its streets, and put there

5. —: —: removal of obstructions by city.

without its authority. This is a correct statement of the law. Counsel seemed to think that it in some way excuses the person who places the obstruction in the streets without authority from removing the same. They asked, "Why should the city be called upon to remove the same?" The answer is, because of its duty to the public. We see no error in this instruction. This disposes of all the errors assigned and discussed on the defendant's appeal, and leads us to the conclusion that the judgment of the district court should be affirmed on the defendant's appeal.

6. —: —: special findings: general verdict.

VI. The plaintiff complains of the overruling of his motion for judgment on the special findings for one hundred and thirty-four dollars instead of for sixty dollars, as returned in the general verdict. The special findings of the jury as to the number of cubic yards of stone used by the city, and the value of the stone per cubic yard, would indicate that a larger general verdict should have been returned, but the plaintiff was not entitled to recover for any rock that he had abandoned. and the jury found that so much of the rock as plaintiff was notified by the city commissioner to remove from the street was abandoned. The jury was not asked to find especially what amount was so abandoned, and, in the absence of such finding, we cannot say that the special findings are inconsistent with the general verdict.

Our conclusion is that the judgment of the district court should be affirmed upon both appeals. AFFIRMED.

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ROBERT COLES *et al.*, Appellees, v. J. W. KENNEDY, Appellant.

1. **Contract**: SUBSCRIPTION TO STOCK IN CORPORATION: CONSIDERATION. The defendant, being the owner of a silver mine in Arizona, prospected the same to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet, resulting

in a find of a small vein of silver ore. He thereupon organized a stock company in Iowa to operate said mine, with a capital stock of five hundred thousand dollars. In consideration of seventy thousand dollars' worth of such stock the plaintiff agreed to pay defendant seventeen hundred and fifty dollars, or convey to him certain real estate. *Held*, that the contract was not without consideration, nor was the consideration so inadequate as to constitute a badge of fraud.

2. ———: ———: FRAUD. The representation by a promoter of a corporation to one, as an inducement to his subscription to the capital stock in such corporation, that a person named, of wide reputation for his sagacity in business affairs, had agreed to subscribe for a large amount of the same stock, without disclosing the fact that said stock was given such person as a gratuity for the use of his name, is such a fraud as will entitle one who has subscribed for stock upon the faith of such representation to have his contract of subscription canceled in a court of equity.

Appeal from Lucas District Court.—HON. CHARLES D. LEGGETT, Judge.

SATURDAY, OCTOBER 25, 1890.

THIS is an action in equity to cancel and annul a certain written contract for the conveyance of real estate, upon the grounds that the same was obtained by fraud and without consideration. The answer denies each allegation of fraud and want of consideration, and asks specific performance of the contract. A decree was entered in favor of the plaintiff granting the relief prayed for in the petition. The defendant appeals.

F. M. Stuart, for appellant.

Mitchell & Penick, for appellees.

GIVEN, J.—The testimony shows that in 1880 appellant was the owner of a mining claim in Arizona, called the "Mina Rica," that had been prospected to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet. A small vein of silver ore was found in the shaft, but not in quantities to justify milling the same. In the spring of 1880, appellant returned from Arizona to Chariton, bringing

with him specimens of ore which he represented to have been taken from his claim. He proceeded to organize a joint-stock company for gold and silver mining in Arizona, "and to purchase the three-fourths interest of the Mina Rica mine." A company was organized with a large capital stock, divided into shares of twenty dollars each. The appellee subscribed for four thousand shares of stock, to be paid for at "fifty cents per share as per agreement with J. W. Kennedy and R. M. Moore." The contract in question was executed and acknowledged April 1, 1880. By it appellee acknowledged himself to be indebted to the appellant in the sum of seventeen hundred and fifty dollars, to be paid on or before April 1, 1881, and, if not paid at that time, appellee was to make to appellant a warranty deed for a certain lot in Chariton. If one-half of said sum was paid within the time named, appellant was to have a deed for the east half of said lot. The only consideration for this contract was thirty-five hundred of the four thousand shares subscribed for by appellee, the other five hundred shares being given to him free of charge. After the organization of the company, appellant gave to appellee and other subscribers orders on the company for their stock. These orders were taken up, and the parties credited with their stock, and statements issued to them showing the amount they were entitled to. As the company desired to raise funds by the sale of stock; it was resolved that none should then be issued to the promoters.

I. But two questions are involved in this case, to-wit, was the agreement without consideration, and was the plaintiff induced to sign the same by fraud? In considering these questions we are to look at the facts as they were then known to the parties. It is not true, as urged, that all the mining company had was a hole in the ground, twenty feet deep. It had the right to prosecute its business of mining upon that claim to whatever extent it pleased. True, the result was uncertain; but it owned a mining claim that had been prospected to the extent

1. CONTRACT: subscription to stock in corporation: consideration.

stated, located in a mining region in the vicinity of valuable mines, and had at least an inviting show of valuable ore. The consideration for the agreement in question was a large amount of stock in the company owning this mining claim, with its limited development and the right to develop it indefinitely. There was certainly not a want of consideration for this contract.

II. We next inquire whether the appellee was induced to execute this contract by reason of fraud, as alleged upon the part of the appellant. It is urged that there is such inadequacy of consideration as to indicate fraud. There was great uncertainty as to what appellee might realize out of the consideration moving to him, but it was not so inadequate as to constitute a badge of fraud. The fraud alleged is that to induce appellee to subscribe for stock in the mining company, and to execute said agreement, appellant exhibited specimens of silver ore containing large and rich proportions of silver, and caused it to be represented to appellee that said ore was taken from the Mina Rica mine; that appellant represented to appellee that one S. H. Mallory had subscribed and paid for five thousand shares in the said mining company; that each of said representations was false and fraudulent; that said mine did not have any silver or gold ore in it, and never had; that the ore exhibited to appellee did not come from and was not taken from said mine; that S. H. Mallory had subscribed for five thousand shares with a secret contract with defendant that they should cost him nothing. All the witnesses testifying upon that subject agreed in stating that there was silver ore in the shaft sunk upon the claim. Appellant testifies that the specimens of ore which he exhibited to appellee were taken from that claim, and this testimony stands uncontradicted by any reliable evidence.

2. —: —: fraud.

S. H. Mallory had resided in Chariton for many years, and was known in the community as a man of

large business experience and capacity, and as a successful business man, whose name as a subscriber would be influential in inducing others to take stock in the mining company. While it is true that Mr. Mallory's name follows that of appellee on the subscription list, it appears that he had agreed to take stock previous to the time the list was circulated for signatures, and that the fact of his agreeing to take five thousand shares of the stock was held out to appellee as an inducement to execute the contract in question. The testimony shows that Mr. Mallory was to have his stock free of charge, and that it was given to him to secure the influence of his name in procuring appellee and others to subscribe. The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the five thousand shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for five thousand shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for stock, and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught.

On the trial appellee examined several witnesses as to representations made to them as inducements to subscribe for stock, to which defendant objected because not made to or in the hearing of the plaintiff, and did not operate as an inducement to him to sign the contract in question. This testimony was taken under defendant's objection. It is not now claimed to be admissible, and, therefore, has not been considered.

The views expressed lead us to the conclusion that the decree of the district court should be AFFIRMED.

THERESA LINDEN, Appellee, v. W. C. GREEN, Sheriff, Appellant.

1. **Action to Recover Possession of Attached Property:** APPEAL. The provisions of section 3019 of the Code of 1873 have no application to actions to recover the possession of specific articles of personal property held by a sheriff under a writ of attachment.

2. **Pleading:** DEMURRER: WAIVER. Where facts constituting ground for demurrer appear upon the face of the petition in a cause, a failure to take advantage thereof either by demurrer or by motion in arrest of judgment will constitute a waiver of the objection. The question of plaintiff 's right to relief because of such facts cannot be put in issue by a denial in the answer.

3. **Evidence:** CROSS-EXAMINATION. Matters which were not inquired of on examination in chief are not the proper subject for cross-examination.

4. **Practice:** INSTRUCTION. An instruction which submits to a jury for its finding a question of fact claimed to constitute a defense to plaintiff 's cause of action, if erroneous at all, will be regarded as error without prejudice as against a defendant who, by his pleading, has already waived his right to insist on such defense.

Appeal from O' Brien District Court.—HON. SCOTT M. LADD, Judge.

SATURDAY, OCTOBER 25, 1890.

ACTION to recover possession of four cows alleged to belong to and to be wrongfully detained from the plaintiff by the defendant, under a writ of attachment in his hands as sheriff against the property of Jacob Bierhaus. The petition alleges service of notice of ownership, refusal to deliver the property, and sets out the notice and affidavit of service as an exhibit. Defendant answered denying that plaintiff was owner or entitled to the possession of the property, and admitting that, at the commencement of this action, he held the same by virtue of a writ of attachment as alleged. The answer shows that defendant proceeded, in the manner authorized by law, to sell said property, and

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states "that, prior to so doing, and to the commencement of this action, no notice of the ownership of said property by plaintiff was, in the manner and form prescribed by law, served upon defendant by plaintiff, and that the notice of ownership, alleged in plaintiff's petition to have been served upon defendant, was served by leaving the copy of the notice and affidavit with defendant, and not the original as required by law." The case was tried to a jury, resulting in a judgment for the plaintiff. The defendant appeals.

Milt. H. Allen and *Geo. E. Clarke*, for appellant.

W. D. Boies and *Warren Walker*, for appellee.

GIVEN, J.—I. The appellee contends that this case comes within the provisions of section 3019 of the Code, requiring appeals from orders discharging attachments to be perfected within two days, and the appeal was not taken in time. No order was asked nor granted in this case discharging the attachment, under which the defendant held the property, nor was the validity of that attachment in question. It is not a proceeding under section 3016, as was the case of *Ryan v. Heenan*, 76 Iowa, 589, cited by counsel. It is an action to recover possession of personal property, and the appeal was taken in time.

1. ACTION to recover possession of attached property: appeal.

II. To a correct understanding of the questions presented it is necessary to notice more particularly the state of the record. The notice of ownership set out was verified by Theodore Linden, and states that appellee is the owner of the property in question by purchase of one Rebecca Bierhaus but does not state for what consideration. It also shows by copy of an affidavit indorsed thereon, that it was served on appellant "by reading the same to him in his presence and hearing, and by then and there delivering to him a true copy thereof." On the trial, appellant objected to the notice and affidavit of service being

2. PLEADING: demurrer: waiver.

received in evidence, upon the grounds that the notice did not recite the consideration given for the property, and that the service was by copy, which did not contain an affidavit made by the claimant. This objection was "sustained on the ground that it was not shown that the sheriff received the notice." Testimony was then introduced tending to show that the original notice was handed to appellant, and by him returned to the party making service. There is conflict in the testimony as to whether the original notice was handed to the appellant or not. Following this testimony the offer was renewed, and the same objections made and overruled. At the close of the testimony for appellee, appellant moved for a verdict upon the grounds, among others, that there was no evidence that a notice of ownership, as required by chapter 45, Laws, Twentieth General Assembly, had been served upon him in manner and form as required. This motion was also overruled. The court directed the jury to determine whether the notice was properly served upon the sheriff "as required by law." That, if the notice was received by the sheriff, they should proceed to consider the other matters in the case, but if not received by him they should find for the defendant. That if the notice was handed to the sheriff, and he took the same, that would be sufficient receiving of it, and that the return thereof, and receipt of the copy, would simply amount to a waiver of his right to the original. There was no instruction given with respect to the sufficiency of the notice. Appellant assigns these rulings and the giving of said instruction as errors, on the grounds that the notice was not verified by the claimant, does not state the consideration for which claimant acquired the property, and because the service thereof was by copy. Appellee contends that as these grounds of objection appear upon the face of the petition, and appellant did not object thereto, by demurrer or motion in arrest of judgment, he must be held to have waived said objections.

Chapter 45, Acts, Twentieth General Assembly, requires that notices of ownership of property held by

officers under attachment shall be in writing, under oath, and shall state that the property belongs to the claimant, the nature of his interest, the facts showing how he acquired such interest, and for what consideration. That appellee could not maintain this action without first giving appellant such notice is not questioned, nor is it questioned but that the petition showed upon its face by whom it was verified, that the consideration was not stated in the notice given, and that the service of that notice was by copy. Section 2650 of the Code is as follows: "When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer. If no such objection is taken, it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered."

Without now determining whether the notice or service was sufficient, we inquire whether appellant waived these objections by failing to demur or move in arrest of judgment. The answer denies the service of notice, "in the manner and form prescribed by law," but the authority to object by answer is limited to cases where the grounds of objection do not appear upon the face of the petition. The inference is plain that the objection cannot be made by answer when the grounds do so appear. The provision, that, if no such objection is taken, it shall be deemed waived, surely means that if it be not taken by demurrer, when that is the proper mode, or by answer, when that is proper, it is waived. *McCormick v. Blossom*, 40 Iowa, 256; *Roop v. Seaton*, 4 G. Greene, 252; *Ryan v. Mullinix*, 45 Iowa, 631. By the denial in the answer these objections were not properly raised.

A motion for new trial is quite different from, and in no sense equivalent to, a motion in arrest of judgment. The purpose and effect of such motions are widely different. The motion for new trial, though based in part upon these alleged errors, cannot be considered

as equivalent to a motion in arrest of judgment. *Kirk v. Litterst*, 71 Iowa, 71. We have before us, then, a case wherein the objections made appear, upon the face of the petition, to be proper grounds of demurrer, and go to the plaintiff's right to maintain the action, yet they were not made by either demurrer or motion in arrest of judgment, as authorized by statute. The query remains whether thereby appellant waived these objections or either of them.

The rule, that objections not properly taken are deemed to be waived, is recognized in a number of the decisions of this court. In *Murphy v. Creighton*, 45 Iowa, 179, which was an action to recover back money paid by mistake, question was made whether mistake was alleged. The court says: "No objection was taken to the petition by motion, demurrer or in arrest of judgment, and we must hold that such objection was waived." *Great Western Printing Co. v. Tucker*, 73 Iowa, 755, was an action upon a settlement. Defendant pleaded a counterclaim accruing before the settlement, to which plaintiff replied. Question was made as to defendant's right to so plead. The court says: "The fact that he [plaintiff] took issue thereon, and went to trial without objection to the pleadings, and by a mere denial of the facts set up therein, leads to the conclusion that it was the purpose of the defendant to waive any objection to the pleading. At least this must be so in the absence of a motion in arrest of judgment." "Plaintiff" was evidently meant where the word "defendant" appears last above. See, also, *Veach v. Thompson*, 15 Iowa, 380; *Egleston v. Brassfield*, 38 Iowa, 698; *Draper v. Ellis*, 12 Iowa, 316; *Nollen v. Wisner*, 11 Iowa, 190; *Wimer v. Allbaugh*, 78 Iowa, 79; *Seymour v. Shea*, 62 Iowa, 708; *Smith v. Burlington, C. R. & N. Ry. Co.*, 59 Iowa, 73; *McKinley v. Chicago, R. I. & P. Ry. Co.*, 47 Iowa, 76; *Olson v. Neal*, 63 Iowa, 214; *Hanks v. North*, 58 Iowa, 396; *Melick v. First Nat. Bk. of Tama City*, 52 Iowa, 94.

We have seen that, under section 2650, when the objection is ground of demurrer, and appears upon the face of the petition, it may be taken by demurrer, and, if it does not so appear, that it may be taken by answer, and if it does not so appear by answer, and if the objection goes to plaintiff's right to any relief, it may be taken by motion in arrest of judgment. In *Seaton v. Hinneman*, 50 Iowa, 395, it was held that, where the petition showed upon its face that the plaintiffs were not entitled to maintain an action when the suit was commenced, and the proof introduced by plaintiff showed the same fact, it was competent for the court to instruct the jury that, under the evidence submitted, the plaintiff could not recover. *Smith v. Burlington, C. R. & N. Ry. Co.*, 59 Iowa, 73, was an action to recover for personal injuries sustained while in the employment of defendant. The petition alleged that plaintiff was employed as a section hand. There was no testimony tending to show the character of his employment, nor that it required him to assist, in any way, in the operation of the trains. The court instructed the jury that upon the pleadings and undisputed facts plaintiff was not entitled to recover. The question raised pertains to the rule of law, as recognized in that instruction, and this court held, that it was not shown that he was employed in the use and operation of the railroad. It was insisted on behalf of the plaintiff that defendant should have assailed the petition by demurrer, and his failure to do so waived the objection. This was held not correct because advantage could be taken by motion in arrest of judgment. It is added: "The court may, at the trial in such a case, direct the jury to find for defendant." It will be observed that in both these cases testimony was introduced without objections and the verdict directed upon the testimony. It was surely not intended by these cases to ingraft upon section 2650 an additional mode by which such objections may be taken. Our conclusion is that as the objections now urged appear upon the face of the petition, and as the defendant failed to

either demur or move in arrest of judgment, he must be deemed to have waived the objections. This conclusion renders it unnecessary that we further notice the other assignments of error based upon the insufficiency of the notice of ownership and the service thereof.

III. Theodore Linden, who acted as agent for appellee in the alleged purchase of the property in question, being examined as a witness for plaintiff, was asked upon cross-examination whether a Mr. Harker had told him before the purchase to look out for an attachment on the property, and that the property was or was about to be attached. The plaintiff objected to the question as immaterial, and as not being proper cross-examination. Appellant complains of the sustaining of this objection. The record fails to show any inquiries upon the examination in chief on this subject, and these questions were, therefore, not proper cross-examination. The same is true as to the further inquiries whether he got a bill of sale or not.

3. EVIDENCE: cross-examination.

IV. If there was any error in giving the instruction referred to above, in respect to the service of notice, it was in submitting that question to the jury, in view of appellant having waived objection to the service as alleged. The error, if it was error, was certainly without prejudice to appellant, as it permitted him to do that which he now claims the right to do, to-wit, to question the legality of the service. The instruction does not leave the jury to determine what was a sufficient service of the notice, but directs them to determine a question of fact, and to find the notice to have been properly served or not, as they may find that fact to be. We have examined the other instructions, the giving of which are assigned as error, and are of the opinion that they fully and fairly presented the issues of fraud to the jury. Our conclusion upon the whole record is that the judgment of the district court should be AFFIRMED.

4. PRACTICE: instruction.

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HENRY SHERMAN, Appellant, v. HENRY HASTINGS, Road Supervisor, Appellee.

Highway: BOUNDARIES: ESTOPPEL. The plaintiff caused a highway to be located across lands owned by him, sold a lot on one side thereof, and afterwards built a fence along said road on the side of the land retained by him, and his grantee built a fence on his side. The space between these two fences was worked and traveled by the public for twenty-five years, and after twenty years the plaintiff rebuilt his fence on the same line. *Held*, that the boundaries of such highway had been established by the acts of the plaintiff, and of the public, and by lapse of time, and that plaintiff was estopped from claiming any portion of said road as his own.

Appeal from Allamakee District Court.—HON. L. O. HATCH, Judge.

SATURDAY, OCTOBER 25, 1890.

ACTION to enjoin the removal of a fence constructed by plaintiff. The defendant claims the right to remove it on the ground that it is in a public highway. There was a trial on the merits; and a judgment in favor of defendant. The plaintiff appeals.

D. W. Reed and *J. H. Trewin*, for appellant.

Hendrick & Deremore, for appellee.

ROBINSON, J.—Prior to the year 1861, plaintiff was the owner of all of the southeast quarter of the southeast quarter of section three, in township ninety-seven, north, of range five west. About the year 1862, he sold, to Otis Peck, a triangular lot in the southeast corner of said tract, containing about two and one-half acres. Peck sold the lot to Fredrick Schafer, and caused plaintiff to convey it to Schafer in October, 1865. The deed of conveyance describes the lot as follows: "Commencing at the southeast corner of section three, in township ninety-seven north, of range five west, running

thence north thirty-five rods, thence westerly twenty-six rods to the center of the road, thence southeasterly along said road thirty rods to the place of beginning, supposed to contain two acres and one hundred and two rods." Schafer sold the lot to Herman Sherman, who now owns it. Before the lot was sold to Peck, plaintiff had caused a highway to be located on or substantially parallel to the line which was afterwards made the southwest boundary of the lot, and had built a fence along the southwest side of the road opposite the lot. After the sale to Peck, plaintiff built a fence north of the lot on the northeast side of the road, and Peck built a fence on the same line produced, on or parallel to the southwest side of the lot. The space in front of the lot, between the fences so constructed on opposite sides of the road, was about fifty feet wide. It was covered with brush and timber where the road was located, and a track was grubbed and broken through it. The fence built by plaintiff on the southwest side of the road remained until about the year 1885, when it was replaced by another built on the same line. About that time a controversy seems to have arisen between the plaintiff and his brother Herman in regard to the true location of the highway, the plaintiff claiming that its center was on the southwest boundary line of the lot, and that his fence was not on the true southwest boundary line of the road. During the latter part of the year 1887, plaintiff built a staked and ridered rail fence parallel to his old fence, but nearer the fence of Herman Sherman, and in what defendant claims to be the highway. It is that fence which plaintiff seeks to enjoin defendant from removing.

The questions presented require us to determine the true location of the highway. While plaintiff admits that for nearly, if not quite, thirty years he maintained a fence on a line southwest of that occupied by the fence in controversy, yet he claims that he did not build it on the line of the highway, but along the edge of the prairie where he could get through the quickest, and that he had no intention to waive his right to claim to

the true line, which was about twenty feet northeast of, and parallel to, the line of his first fence. There is much conflict in the evidence, but the material facts of the case, in addition to those already stated, appear to be, substantially, as follows: When the lot was sold to Peck it was verbally agreed between him and plaintiff that a part of the lot, two rods wide along its southwest side, should be used for the road. The northwest boundary is made by the deed to terminate on the west, in the center of the road, and the southwest boundary is made to extend along the road. At the time the deed was executed the road was traveled and fenced on both sides, as already stated, and we are satisfied that it was recognized and treated by all parties in interest as being located as traveled and fenced, and that the southwest boundary line of the lot was along the center of the space between the two fences. The plaintiff claims that the fence built by Peck was on his lot, two rods from the center of the road, and that his brother has moved it out about two rods. The testimony as to the alleged relocation of that fence is very conflicting, but we are of the opinion that plaintiff has failed to establish his claim in regard to it. The fence built by Peck has been rebuilt, but on the same line, excepting for a distance of three or four rods at the north end where it was moved out five or six feet to make it on a line with plaintiff's fence, north of the lot. Plaintiff states that Peck's fence was built on the northeast boundary line of the road. It follows that his old fence, which was but about fifty feet from the fence built by Peck, could not have been southwest of the southwest boundary line of the road, and that his present claim as to the true line is not well founded. The plat and field-notes of the survey, made when the road was established, were introduced in evidence, but the notes are shown to be defective, and both parties claim support from them. The fact that the road on the line, as claimed by defendant, was worked and traveled by the public for twenty-five years, without objection on the part of plaintiff, and the further fact that he built and so maintained his fences as

to indicate an intention on his part not to claim any of the land so used, as against the public, raise a strong presumption in favor of the claim of defendant, which the evidence has wholly failed to overcome. Even had no steps been taken to establish a highway on the line in question, in the manner provided by law, we should be fully justified in finding that it had been established by the acts of plaintiff, and of the public, and the lapse of time. *Onstott v. Murray*, 22 Iowa, 457; *Quinton v. Burton*, 61 Iowa, 471; *State v. Birmingham*, 74 Iowa, 407; *State v. Waterman*, 79 Iowa, 360. The judgment of the district court appears to us to be correct. It is, therefore, AFFIRMED.

D. M. OSBORNE & Co., Appellee, v. WILLIAM BACKER *et al.*, Appellants.

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Contract: WAIVER OF CONDITIONS BY AGENT. A provision in an agreement in writing that "no one has any authority to add to, abridge or change it in any manner" is inoperative, in that it precludes any amendment of the contract by the parties themselves, and a waiver of any of the conditions of such contract by one of the parties thereto, or by a duly authorized agent, will be enforced notwithstanding such provision.

Appeal from Buena Vista District Court.

SATURDAY, OCTOBER 25, 1890.

ACTION on two promissory notes. Defendants admit the execution and delivery of the notes, and plead by way of counterclaim that the consideration for the notes was a certain binder, which plaintiff warranted to the defendants, and that there was a breach thereof to their damage in the sum of one hundred and ninety dollars. Plaintiff in reply denies a breach of the warranty, and at the conclusion of the defendants' evidence the court, on motion of plaintiff, directed a verdict in its favor for the amount of the notes, and

judgment was entered thereon, from which the defendants appeal.

C. A. Irwin, for appellants.

Bailie & Sisson, for appellee.

GRANGER, J.—The warranty of which a breach is claimed is as follows:

"This machine is hereby purchased and sold subject to the following warranty and agreement, and no one has any authority to add to, abridge or change it in any manner. All our machines are warranted to be well built, of good material, and capable of cutting, if properly managed, from ten to fifteen acres per day. If, on starting the machine, it should in any way prove defective, and not work well, the purchaser shall give prompt notice to the agent of whom he purchased it, and allow time for a person to be sent to put it in order. If it cannot then be made to do good work, the defective part will be replaced or the machine received back from the purchaser at the office of the agent from whom it was purchased, and the money or notes returned. Keeping the machine during harvest, whether kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty.

"WILLIAM BACKER,
"SARAH BACKER."

The particulars of the breach as alleged are that the binder was not well built, and did not do good work. The record shows conclusively that there was a breach of the contract, and that fact stands unquestioned. It will be observed that the contract provides that if the machine is not made to work well it will be received back "at the office of the agent from whom it was purchased," and that "keeping the machine during harvest, whether kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty." The machine was not returned, and, as an excuse therefor, defendants pleaded that in due time

they made the offer to return it, and that plaintiff's agent at the place requested them to retain it for plaintiff to make further effort to put it in order.

The assignments are based on the action of the court in excluding offered testimony, and it will be necessary to set out some parts of it. The defendant, William Backer, testified that the order for the machine was given to Robert Biddle, Joseph Hoopes, and W. C. Wilson, as agents for the plaintiff. After describing the defective workings of the machine, his testimony was continued, and the following partial exhibit of the record will be sufficient to properly understand the assignments we are about to consider: "I notified the company of the defects in the machine four times. Mr. Wilson came out four times, and tried to make it work, but could not make it do any better.

"*Q.* How many times did they come out? *A.* Four times. The last time I came in and told them that the machine would not work, and I would not keep it. Mr. Biddle said they had found out it was all in the twine, and he said to keep it and they would see that it worked all right the next year. (Plaintiff objects, as incompetent, and moves to strike out the answer.) By the court: Sustained. (Defendant excepts.)

"*Q.* What did the plaintiffs say when you told them that you would bring the machine back? *A.* Mr. Biddle and Osborne's man said that it was all in the twine. I told them I did not want the machine, and I was going to bring it back, and they said keep it and they would guarantee that it would be put in working order the next year, and work all right. I asked Mr. Biddle: 'Are you working for the company yet?' He said, 'Yes.' I asked him, 'Have you authority to make this contract?' He said, 'I have.' (Plaintiff objects as incompetent. Sustained. Defendant excepts.) I kept the machine the following summer. The company sent a man out twice during the second season to remedy it, but they failed to make it work.

"*Q.* Do you know what this man Biddle was doing for D. M. Osborne & Co. at the time? *A.* Why, he was taking orders for machines, and acting as general agent. (The plaintiff moves to strike out the answer as not responsive and immaterial, and not showing that he had any knowledge of his agency or powers or authority.) By the court: I will strike out the latter clause relating to the statement of the nature of the agency. (The defendants except.)"

Eli Backer, being produced and sworn on behalf of defendants, testified: "I know that R. Biddle was the agent of plaintiff during the season of 1886. He came out to fix the binder several times, but could not make it work."

William Backer, recalled by the defendants, testified as follows: "*Q.* State whether you know whether the man that took this order was acting as general or special agent of this plaintiff. (Objected to as incompetent, immaterial and irrelevant. Objection sustained, and defendants except.)"

I. It is manifest that the effort of the defendants was to show that the plaintiff had waived the condition of the contract as to the return of the machine, and it is equally manifest that the conviction of the district court was against its right to do so, and relied for its ruling on the first sentence of the contract as follows: "This machine is hereby purchased and sold subject to the following warranty and agreement, and no one has any authority to add to, abridge or change it in any manner." The language of the sentence is sufficiently comprehensive to include the parties to the contract, and, if operative, the position of the district court is certainly correct. Is, then, a stipulation in a contract that the parties to it may not change it in a lawful manner, of any force? We should be careful here to avoid a confusion of this question with that of the rights of parties to limit or restrict the manner or method of changing contracts,- as by providing how or by whom changes may be made. This contract is as conclusive against the defendants for such a purpose as against

those acting for them, and is of the same force against the plaintiff. The question may be presented more readily by an illustration. Suppose A contracts with B to erect for him a house of specified dimensions and architecture, to be completed by January 1, and the contract contains a clause identical with this as to changes. Afterwards they do agree to change the contract as to dimensions, architecture and the time of completion, and A performs under the terms of the contract as changed. Is the stipulation against changes of force against A in his effort to obtain compensation? We think not, and that the illustration is equally applicable to the question before us, so far as the parties are concerned. The authority of agents will be noticed hereafter. Treating for the moment the answers to the questions as not excluded and true, and the presence of the plaintiff in lieu of his agents, and we have this state of facts: The failure of the machine to do good work; the effort of plaintiff, and a failure to suitably repair it; the offer to return it to the place of purchase; a request by the plaintiff to retain it till another season for another opportunity to repair the defect; and an effort and failure by plaintiff to make the machine work the next season. We are of the opinion that such a state of facts would be a complete waiver of the agreement to return the machine, and that the rights of the parties to make such waiver is not, in law, denied by the stipulation in the contract against changes.

Having held that the parties by themselves might waive the agreement to return the machine, could it be done by the agent of the plaintiff? The plaintiff being an aggregation of persons, it could only act by an agent, and of necessity the change must be so made; and the stipulation has no reference to particular persons or classes of persons; it is against changes by anyone. The proceeding, then, is uninfluenced by the stipulation, and any competent agent could bind the parties.

II. The only remaining question is as to the authority of the agents, or persons with whom the

defendants were dealing. By reference to the testimony, it will be seen that the court refused to allow their agency or the extent thereof to be shown, and probably because of the stipulation against changes in the contract. The defendants should have been allowed to show the capacity in which these persons were acting, and, with the record before us, it would seem that the case of *Pitsinowsky v. Beardsley*, 37 Iowa, 9, would be a safe guide as to the authority of agents to waive such conditions. Appellee claims that the case is controlled by that of *Wood Mowing & Reaping Machine Co. v. Crow*, 70 Iowa, 340, but, as we understand, the claim is based on the effect given to the stipulation as to changes in the contract. With that obstacle disposed of, we think the way to a correct conclusion is not difficult, and the judgment is REVERSED.

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THE STATE OF IOWA, Appellee, v. GEORGE WATSON, Appellant.

1. **Rape**: EVIDENCE. Upon a trial under an indictment for rape committed upon a girl of immature years, leading questions may, in the discretion of the court, be asked the girl as to the position occupied by the accused at the time the act is alleged to have been performed, as to any pain caused her by defendant's act, and as to evidences of violence subsequently found upon her clothing.

2. ——— : ——— : DECLARATIONS. The testimony of a witness, upon a prosecution for rape, that the subject of the rape "told her the whole circumstance," but not relating the circumstances, is error without prejudice.

3. ——— : ——— : TESTIMONY IN REBUTTAL. Where, upon a trial under an indictment for rape, the prosecuting witness has given explicit testimony to the fact of the penetration of her body, and a physician, who had examined her organs shortly after the act is alleged to have been committed, testifies, upon behalf of the accused, that at the time of his examination he found the hymen "intact" and "without rupture," testimony by physicians for the prosecution as to the condition of the hymen at the time of an examination subsequently made by them, and indicating penetration in fact, is competent as proof in rebuttal.

4. ——— : INSTRUCTIONS. A party is not entitled to have a jury instructed as to the law applicable to an issue upon which no evidence has been introduced.

5. ——— : ———. A court's charge to a jury which contains correct abstract propositions of law, applicable to the case, but which is defective in not being as specific as might be with reference to the facts of the particular case, will not be regarded as reversible error where the party objecting fails to ask for more specific instructions, and there is no showing of prejudice on account of the defective charge.

6. ——— : ———. An instruction which charges the jury to consider and weigh all the testimony and circumstances bearing upon the issues in the case, and then calls special attention to various branches of the evidence, but omits reference to certain important portions of defendant's evidence, is not objectionable as limiting the evidence to be considered by the jury.

7. ——— : ———. The fact that the evidence submitted to a jury in an instruction as proper for their consideration in determining the question, whether the testimony of the prosecutrix in a prosecution for rape is corroborated in the manner that the law requires, is not such corroborative evidence, will not constitute the giving of such instruction a reversible error, when the record shows there was other evidence, not referred to in said instruction, that is in fact corroborative.

8. ——— : ———. A witness, called as an expert, who has heard the testimony of another expert, given upon the same trial, in the presence of the jury, may be asked to give an opinion upon the state of facts thus heard by him, without the facts upon which the opinion is to be based being put to him in the form of a hypothetical question.

9. ——— : NEW TRIAL : NEWLY-DISCOVERED EVIDENCE. Newly-discovered evidence which is merely cumulative in its nature will not entitle a party to a new trial.

Appeal from Dallas District Court.—HON. A. W. WILKINSON, Judge.

SATURDAY, OCTOBER 25, 1890.

UPON a trial under an indictment for rape, the defendant was found guilty, and from a judgment committing him to the penitentiary for a period of five years he appeals.

White & Clark, for appellant.

D. W. Woodin, County Attorney, and *John Y. Stone*, Attorney General, for the State.

GRANGER, J.—The alleged rape was upon one Elsie Young, a step-daughter of the defendant, then about eleven years of age. Her statement of the tragical affair is that on the day following Easter Sunday, 1889, her mother had gone to Van Meter, and she went to the seed-house for molasses for the table, and the defendant came in and lay her on some sacks and had intercourse with her; that she called for her younger sister, who came, and the defendant sent her back, and renewed his assault upon Elsie; that this act was repeated in the same place on the next day, and again, some two or three days thereafter, at the barn; that defendant told her not to tell her mother, and that if she did he would give her a horse-whipping; that she first told her grandmother of the affair some two weeks after it occurred.

I. At the trial of the indictment Elsie Young was a witness, and complaint is made that certain questions to her were leading. Two or three questions will suffice for our ruling upon this point. The witness had stated in a general way what had occurred, and the county attorney, with a view to particulars, said to the witness: "You may state to the jury whether or not there was any blood on your drawers. You may state to the jury whether or not he did hurt you. While you were on the bags, you can tell the jury whether or not George was right over you." These questions were answered in the affirmative. The first and last questions might, in general, be regarded as technically faulty, because in the first the witness might have been left to name what was on her clothing, and in the last to define in her own words the position of George. The second question was entirely proper. It is difficult to see how it could well be framed otherwise. As applied to this case, there could be no just complaint

1. RAPE: evidence.

as to any of the questions. The witness was of tender years; was before the court and jury; and the subject was of exceeding delicacy to her. The discretion of the court was properly exercised. It is not the law that, merely because questions may be answered by yes or no, they are leading. *Woolheater v. Risley*, 38 Iowa, 486. But the rule of that case is not to be accepted with too much liberality, and lead to the framing of questions that merely leave the witness to reflect the language of the questioner by an affirmative or negative answer. Statements of fact, as a general rule, should be in the language of the witness. There are liberal exceptions to the rule to be applied by the trial court. 1 Greenl. Ev., secs. 434, 435.

2. —: —: declarations.

II. Complaint is made that the court permitted Mabel Young, grandmother to Elsie Young, to state in evidence the particulars of her complaints, but in this respect there is a misapprehension of the record. Under the holding in *State v. Mitchell*, 68 Iowa, 116, the witness had the right to state that Elsie told her what the defendant did,—as that he ravished or had intercourse with her; and more than that the court would not permit in this case. The witness, after the court had told her only to state if Elsie told her that defendant "abused her, or made an assault on her," said: "Yes; she told me. She told me the whole circumstance." It is likely the last clause that appellant complains of, but the circumstances were not related by the witness, and the statement is without prejudice; and, besides, the court had by no ruling admitted it, and the defendant took no steps to purge the record of it, as he should have done. The court also, in its instructions, guarded the jury against the consideration of any statements as to particulars made by Elsie to the witness. An inferential criticism is made as to the remarks of the court in this connection, but the argument designates no particular statement, and we discover nothing erroneous.

III. During the introduction of the plaintiff's rebutting evidence Drs. Calvin and Caldwell were

3. ——: ——: testimony in rebuttal.

introduced and gave evidence of having made a personal examination of Elsie Young, and of the condition in which they found her, and appellant's complaint in this respect is that the testimony was not rebutting, and the requirements of the statute had not been observed to render them competent witnesses to prove the indictment. A closely controverted point in the case was as to the actual penetration of the person of Elsie Young. Her testimony was explicit that there was such penetration. The defendant afterwards used as a witness one Dr. Page, who had examined her, who swore that he found her private parts extremely sore and sensitive to the touch, and that the hymen was intact, without rupture. He also gave testimony based on his examination, as to the probable length of time since the injury, it being a theory of the defense that the prosecution was the result of a conspiracy led by Mabel Young, and that the injury was a part of the plan, and of a more recent date than the alleged assault by defendant. The testimony of Drs. Calvin and Caldwell was upon the same subject as that of Dr. Page, both as to the condition of the hymen and of the probable length of time between the injury and the examinations, and the testimony was to quite an extent contradictory; one of them saying: "I found the hymen torn through; the edges red, inflamed; parts of it healed, other parts granulating, or healing, and excessively tender to the touch." Appellant's argument goes more to the value of the testimony to show particular facts than to the question of its admissibility. The testimony was rebutting. Authorities are not very accurate as to the dividing line between what is rebutting evidence, and what is not. The question has received some consideration, as applied to criminal cases, by Mr. Justice WRIGHT, in *State v. Parish*, 22 Iowa, 284, and the holding or reasoning there is not against the action of the district court in this case.

IV. The county attorney, for the purpose of getting from Dr. Caldwell his opinion as to the length of time the injury was inflicted before the examination,

grouped certain facts, and based his question thereon, and appellant claims the facts had no foundation, or at least not sufficient foundation, in the evidence; but we think otherwise. The question seems to have full support in the record when fairly considered. And we also think the objection to Dr. Caldwell's testimony as to the condition of the girl, because the examination was some four weeks after the alleged occurrence, is not well taken. The value of the testimony was for the jury. *State v. McLaughlin*, 44 Iowa, 82; *State v. Teipner*, 32 N. W. Rep. (Minn.) 678; *Pless v. State*, 3 S. W. Rep. (Tex.) 576.

4. ——: instructions.

V There is a complaint that the court did not instruct the jury on the "defendant's theory of the case,"—that there was a conspiracy to prosecute him. Our examination of the record discloses no evidence on which to base such an instruction. Appellant refers to some items of evidence showing the conduct of certain parties, and in some instances misconduct; but, without the claim being made, a reader of the evidence would not think of a conspiracy. There is no evidence tending to show such a fact. While appellant asks instructions on other branches of the evidence, there is none on the question of a conspiracy, which fact tends to strengthen our position.

5. THE same.

VI. The physicians in their testimony gave opinions based on hypothetical questions, and the court, in its sixth instruction, said to the jury that, to render such opinions of any value, all the material facts embraced in the question must have been established by the proofs, and the complaint as to the instruction is that it does not determine for the jury what facts were material, but leaves the jury to determine that question. No question is made but that the instruction states a correct abstract proposition of law, and one having support in the record. If the defendant desired that an instruction should be given more specific as to the facts of the case, he should have asked

for it. There is no such defect in the instructions as to indicate prejudice, or that defendant has not had a fair trial. *State v. Tweedy*, 11 Iowa, 350; *State v. Helvin*, 65 Iowa, 289. The same holding and authorities apply to appellant's complaint of the seventh instruction.

VII. The ninth instruction is as follows: "The charge of rape against a person is easy to make, difficult to prove and more difficult to disprove, and in considering a case of this kind it is the duty of the jury to carefully and deliberately consider, compare and weigh all the testimony, facts and circumstances bearing on the acts complained of, and the utmost care, intelligence and freedom from bias should be exercised by the jury in the consideration thereof. The time and place of the alleged acts; relation of the defendant to the said Elsie Young, upon whom the assault is alleged to have been made; her age and intelligence, strength and physical development; his influence and power over her, if any; her condition thereafter, together with the condition of her clothes; evidence of injuries, if any, upon her person; appearance of the same when examined; the time since said injuries appeared to have been made; the length of time after the alleged transaction before complaint was made by her; the place where said acts are alleged to have been committed; the corroborating evidence, if any; what was said by him, if anything, to the little girl, Ellen May Watson, at the time of the alleged acts; what, if anything, she, Ellen May Watson, saw and heard at the time,—together with all the other facts and circumstances of the case, as the same have been developed and established by the proof in the case, should be considered by you while you are considering whether the defendant is or is not guilty of the crime charged."

6. THE SAME.

It is said that this instruction is in conflict with the rule given in *State v. Meshek*, 51 Iowa, 308, in that it gives undue prominence to facts relied upon by the state, and leaves out of consideration by the jury facts important to the defendant. The appellant refers to

the fact that Dr. Page testified that the hymen was not broken, and also calls attention to the testimony that Mabel Young "drilled" Elsie Young and her sister as witnesses. In the *Meshek case* an instruction was disapproved because the effect of it was to exclude from the consideration of the jury certain evidence proper for the determination of an important fact in the case. No such objection can be urged to this instruction. It does call attention to particular and important facts, but has no such effect as limiting the evidence to be considered in the finding of any fact in the case. So far as the condition of the hymen is concerned, it is silent, as it is with regard to many other incidental questions in the case, but none are excluded in effect because not mentioned. The mention of such facts in instructions is not required of the court. *State v. Miller*, 65 Iowa, 60.

VIII. The court's twelfth instruction was with regard to the necessary corroboration of Elsie Young, and is as follows: "The fact of the injuries of Elsie Young, if any, or the fact that a rape had been committed upon her by some one, would not be such corroborative evidence as the law requires to connect the defendant with the commission of the offense, but such connection must be shown by other facts and circumstances tending to connect the defendant with the commission of the act charged. The corroborating evidence required to warrant a conviction is evidence tending to strengthen and corroborate the evidence of the said Elsie Young, and to point out the defendant as the person who committed the offense, if any offense was committed. And upon the question of the corroboration of her, the said Elsie Young, you should consider the time and place where said offense is alleged to have been committed; whether or not he has been proven to be with the said Elsie Young at the time of said rape; whether or not the little girl, Ellen May Watson, was present at the time; what, if anything, he said to the little girl, Ellen May Watson, together with his conduct and appearance at

7. THE same.

the time,—together with all the other facts and circumstances of the case, as the same have been shown and established by the proof."

It is urged that none of the facts grouped in the instruction "corroborate or tend to corroborate the prosecution," because Ellen May Watson says that the same thing had occurred "both before and after the alleged rape." But there is more of her testimony, and it is to be considered in connection with the testimony of Elsie, who says that when the assault was being made upon her she called for her sister, Ellen May. Ellen May testifies that she heard a cry, and thought it was her little brother Walter at the barn, and started to go there, and defendant stepped out of the seed-house and sent her back; that the seed-house was small, and no room to play in it; and he had at other times done the same thing. When he came out this time she had not reached the seed-house, and was not going there, but past there, to the barn. The testimony only justifies the belief that when defendant had sent Ellen May away from the seed-house, before or after, it was when she was there for play, and, there being no room, he would send her away. It is somewhat strange that at this time, when she had not offered to come in, he should leave his work to open the door, and threaten to whip her if she did not go back. Admitting the statements of Ellen May to be true, there is little room to doubt that Elsie was calling from the seed-house to her; and no doubt that Elsie and defendant were at the time in the seed-house; that Ellen May was sent back, as she says,—and then let it be conceded, as the jury might find, that the crime of rape was committed, and we think there is corroborative evidence tending to connect the defendant with the commission of the offense.

IX. Appellant says there should be proof of penetration, and urges that there is none, because Dr. Page says there could not have been penetration in this case without a rupture of the hymen, and that there was none. But the testimony of Dr. Page is not conclusive.

There was testimony that there was a rupture. It was a question for the jury.

6. THE same.

X. When Dr. Caldwell was on the witness stand, the county attorney, with a view to obtaining his opinion as to the length of time since the injury, and on the same state of facts on which Dr. Page had given his opinion, asked the witness if he heard Dr. Page's testimony, and he answered, "Yes." Counsel then asked: "You heard him describe the condition of the girl when he examined her? *A.* Yes. *Q.* Now, under such circumstances as he described, would it be possible for a physician to tell, with any reasonable degree of certainty, as to how long prior to the examination the injury had been inflicted?" The question was answered against the objection of the defendant, and we meet a question somewhat new and difficult. The complaint is that the question should have grouped the facts and not have left them to the recollection of the witness. The method claimed is the one in general practice, and, as a rule, to be commended. But we must determine if the rule is imperative.

We are referred to the case of *People v. Aikin*, 33 N. W. Rep. (Mich.) 821, as supporting appellant's view, and that the ruling of the district court is erroneous. If the effect of the holding in that case is to be limited by the record on which the ruling was made, it is no authority for our guidance. In that case the witness had read the testimony of another physician in a *post-mortem* proceeding, and on the trial of an information for manslaughter, after stating that he had read such testimony, and knew what the doctors had there stated, he was asked to state his opinion as to a physical condition, based on such testimony, and the court held the question improper. In that case the jury had no knowledge whatever of the fact upon which the opinion was sought to be based, and of course the opinion could not aid to a conclusion from such facts. The facts upon which the hypothetical question is based, or which serve as the ground-work of the opinion of an expert witness, are all important to the end desired.

We quote as follows from the opinion in that case: "The facts as testified to by Dr. De Camp, as to this particular condition of the parts named, should have been stated to the witness. Otherwise the jury could not know upon what facts Dr. Maxim was stating his opinion. An expert can never be safely permitted to state that he has read or heard the testimony of a witness or witnesses, and then base his opinion on such testimony, without stating the particular points of the evidence, the facts upon which he rests his conclusion. There is no reputable authority for any such method of examining an expert witness." It is but fair, in applying the language of the court in that case, to limit it to the fact of the witnesses having read or heard the testimony of witnesses in other proceedings, as was the fact in that case, for the ruling is applied to a state of facts in which "the jury could not know upon what facts the doctor * * * was stating his opinion." If the situation is such that the jury knows the facts upon which the opinion is founded, the reasons for the holding in the Michigan case do not exist. Certainly there is no particular merit in the facts being stated in the question, if known as well without; and that, it seems to us, is the controlling thought upon which the point is to be ruled. Are the facts known to the jury? If so, the case has every advantage that could result from their being stated in the question. In *Butler v. Insurance Co.*, 45 Iowa, 93, this court had under consideration the competency of a question to an expert witness, although not directly presenting this question; and the court at least intimates that, with the facts as in this case, it might hold to the same rule as did the district court in this case. In that case the question did not assume the statements in the testimony heard by the expert witness as facts, but left the witness to draw his conclusion on a question of sanity from such conclusions and his own knowledge. The court said: "We might hold the ruling correct if the questions had been put conceding the testimony to be true, or in some way indicating that the witness was not left to give his opinion of

the testimony." The question in this case is not open to such a criticism.

It seems to us that no arbitrary or unyielding rule should govern in the production of this class of evidence. Keeping in view what should be as a basis for an opinion, and the district court in its attainment may exercise a reasonable discretion. If a witness states to the jury particular facts in the presence of an expert witness on which the expert is to state his opinion, and the latter follows the former while the facts are fresh in the minds of the jury, a rule that would require the facts to be again stated would certainly be of doubtful utility. If either party doubts that the facts are understood, the witness may be asked to state them, and thus avoid any objection that could be urged. In this case the jury had heard the statements of Dr. Page but a short time before, and there is no pretense in the record or argument of even a doubt that the facts were understood. The question for us is, is it absolutely essential that the facts should be embodied in the question? We think not, and that there was no error in the ruling of the district court. This conclusion has support in *Wright v. Hardy*, 22 Wis. 348, and in *Dwinnell v. Abbott*, 43 N. W. Rep. (Wis.) 496. The rulings in *State v. Felter*, 25 Iowa, 67, and *Muldowney v. Illinois Cent. Ry. Co.*, 39 Iowa, 615, are not upon the grounds that the facts were not stated in the question, but because the question substituted the conclusion of the witness for that of the jury.

It will be understood that we do not hold that in cases where a number of witnesses are examined upon a given question in issue—as, for example, when the alleged insanity of a person is interposed as a defense in a criminal case—it is allowable to call expert witnesses and ask them if they have heard the testimony in the case, and ask of them their opinion of the state of mind of the person charged. Such a course of examination might put the witness in the place of the jury, and require him to determine questions of fact from conflicting evidence, when the opinion of the expert should be based on admitted or assumed facts. In all cases where

the facts on which the opinion is to be based are in dispute, the hypothetical form of question should be used. And such, we believe, has been the general practice in the state. In this case the question propounded to Dr. Caldwell was directed alone to the testimony of Dr. Page as to the condition of the girl when examined by him, and there was no dispute as to the facts testified to. In such a case the court could safely permit the expert witness to state his opinion on the facts as he had heard them from the witness but a short time before.

XI. Some other questions are argued, which we have examined, and discover no error. To our minds, the verdict has support in the evidence. The newly-discovered evidence on which a new trial is asked is cumulative only, and, as held in *State v. Bowman*, 45 Iowa, 418, the statute makes no provision for a new trial on that ground. It does, however, state the causes for which new trials may be granted in criminal cases. The judgment below is AFFIRMED.

9. ——: new trial: newly-discovered evidence.

In the Matter of the ASSIGNMENT of JOSEPH HOBSON for the Benefit of Creditors.

1. **Equity**: INSOLVENCY: MARSHALING OF ASSETS. A creditor of an insolvent has not, as against a surety upon an obligation held by another creditor of the same debtor, such a superior equity in the fund representing such insolvent's estate, as to entitle him to compel the creditor, whose claim is so secured, to resort to the surety for payment, before seeking satisfaction out of the common fund.
2. **Inconsistent Remedies**: ELECTION. A creditor of an insolvent is not estopped from asserting his claim against the fund in the hands of such insolvent's assignee, under a general assignment, because of the commencement of an action by one liable as surety on such claim, attacking the validity of such assignment, and which was subsequently dismissed.*

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*A recent case of value upon the question of election between remedies, under circumstances similar to those in this case, is that of *Mills v. Parkhurst*, 26 N. E. Rep. (N. Y.) 1041. A creditor of an

Appeal from Fayette District Court.—HON. L. O. HATCH, Judge.

SATURDAY, OCTOBER 25, 1890.

APPEAL from an order allowing a claim filed with the assignee of an insolvent, who had made a general assignment for the benefit or creditors.

A. Chapin, for appellant: A creditor cannot attack an assignment, seek to set it aside, or treat it as void, and also file his claim under it, and ask to have a dividend. Burrill on Assignment [5 Ed.] secs. 479, 482, 507; *Vernon v. Morton & Smith*, 8 Dana (Ky.) 254. An assignment cannot be questioned by a creditor who has taken a dividend. *Adlum v. Yard*, 1 Rawl. 163; s. c., 18 Am. Dec. 609; *Jones & Waterbury v. Horsey*, 4 Md. 307. A creditor cannot claim both under and against an assignment. *Hatchet v. Blanton*, 72 Ala. 423; *Rapalee v. Stewart*, 27 N. Y. 313, 314; *Hone v. Henriquez*, 13 Wend. 240. Inconsistent remedies and proceedings cannot be prosecuted in a court of justice. The party will be held to have adopted that which he first employs, and to have waived all others inconsistent with it. Bigelow on Estoppel [Ed. 1872] chap. 20, p. 578; *Morris v. Rexford*, 18 N. Y. 557; *Rodermund v. Clark*, 46 N. Y. 356-7. This principle is of well known and general application in assignment cases, as well as many others. *Crawford, Trustee, v. Nolan*, 70 Iowa, 98, 99; *Citizens' Bank of Greenfield v.*

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insolvent, after making proof of his claim before the assignee, commenced an action to set aside the assignment as fraudulent, and, being defeated in such action, sought to share in the distribution of the assets in the hands of the assignee. This demand was resisted by the other creditors, who contended that, in bringing the action to set aside the assignment, such creditor had elected to repudiate the assignment. But the court of appeals held that the doctrine of election had nothing to do with the question. That the creditor had a perfect right to test the validity of the assignment by special action, and, if defeated upon that issue, "it in nowise militated against the right * * * to share in the assigned estate, on the basis of distribution provided in the debtor's deed to his assignee."—REPORTER.]

Dows, 68 Iowa, 460–462; *Dyckman v. Sevatson*, 39 N. W. Rep. 73; *Green v. Cross*, 10 N. W. Rep. 460, near bottom of page; *New England Bank v. Lewis*, 25 Mass. 119. "Any decisive act of the party with knowledge of his rights and of the fact determines his election in the case of conflicting and inconsistent remedies." *Sanger v. Wood*, 3 Johns. Ch. 422. See also *Wilhelmi v. Leonard*, 13 Iowa, 340; *Gessie v. Beall*, 3 Wis. 391. "If one elects between two inconsistent remedies, the right to pursue the other is forever lost." *Farwell v. Myers*, 26 N. W. Rep. (Mich.) 330; *Strong v. Strong*, 5 N. E. Rep. (N. Y.) 799. The bank knew that attachments were to be prosecuted in its name, and made no objection whatever. It, therefore, clearly ratified the proceeding. Silence with full knowledge of the facts is sufficient to create an estoppel. *Decorah Woolen Mill Co. v. Greere*, 49 Iowa, 495-6; Bigelow on Estoppel [Ed. 1872] middle p. 500, bottom p. 501, top p. 502; Story on Agency [3 Ed.] secs. 90, 91, 255, *et seq.* The bank, by appearing in the attachment suits and demanding judgment against the sureties, ratified the whole. *Krider v. Trustees*, 31 Iowa, 550. Under the equitable jurisdiction of marshaling securities, a creditor who has two funds will be required to first exhaust that upon which another creditor cannot go. *Wurtz & Co. v. Hart*, 13 Iowa, 518. The liability of the sureties to the Fayette County National Bank constituted a fund which was available to that creditor alone. *Neff v. Miller*, 8 Barr. 347, cited in 2 White and Tudor's Leading Cases, pt. 1, p. 163, Hare & Wallace's notes; Story's Eq. Jur. [3 Ed.] last part of secs. 642, 645. Courts of equity will, when one creditor has a claim against two joint debtors, and another creditor has a claim against only one of these, require the first creditor to resort to that debtor against whom the second creditor has no claim in all cases where an equity supervenes in favor of one of the debtors, or his creditor, and as against the other joint debtor. See note to case of *Aldrich v. Cooper*, 2 White & Tudor Leading Cases, pt. 1, p. 169.

L. L. Ainsworth, for appellees: The statute provides that the surety may by writing require the creditor to sue or permit the surety to commence suit in the creditor's name at the surety's cost, and if the creditor refuses or neglects to bring suit for ten days after a request, and does not permit the surety to do so, the surety shall be discharged. Code, secs. 3285–6. In the case at bar the notice required the Fayette County National Bank to sue or permit the sureties to sue, as is provided by section 2108 of the Code of 1873. See Abs., p. 7. The consent given was such as the statute required to be given to prevent the discharge of the surety unless the creditor brought suit in his own name. *First National Bank of Newton v. Smith*, 25 Iowa, 21, 23; *German American Bank v. Denmire*, 58 Iowa, 137, 138, 139. The only condition required to entitle a creditor to share in the assets of the estate is, that he present his claim under oath within three months after notice to him by the assignee of the assignment. With this requirement appellee complied. That the filing of the claim was an abandonment of the attachment proceedings, there can be no doubt. Am. Dec. 621–622, and reference; *Rapalee v. Stewart*, 13 N. Y. 313-314; *Hone v. Henriques*, 13 Wend. 242-243; *Jewett v. Woodard*, 1 Edwards' Chan. 195, in which the court says: "A creditor coming in under a voluntary assignment must comply with its conditions; but a commencement of a proceeding or suit for his debt, if he chooses to abandon it or it prove unavailing, will not bar him from the benefit of the assignment." We are aware of no case in any court holding any doctrine other than above. In the case of *Sanger v. Wood*, 3 Johns. Chan. 422, cited by appellant, the same doctrine is held. Appellant has a peculiar idea as to the meaning of marshaling of assets, if he believes as he argues that the property of a surety on the note of an assignor is a part of the assets of the estate of such assignor. The rule is never applied unless it can be done without injustice to the creditors, or other party in interest, having a title to the double

fund; and, also, without injustice to the common creditor. *Dickson v. Chorn*, 6 Iowa, 32. This doctrine is a settled doctrine of all the courts in the country. *Johns v. Reardon*, 11 Md. 465; Story's Eq. Jur., sec. 560.

ROBINSON, J.—The evidence upon which this cause was submitted in the district court consists of an agreed statement of facts. As nearly as we can determine from the record, the material facts of the case are substantially as follows: On the twenty-sixth day of November, 1887, Joseph Hobson made to D. W. Clements a general assignment for the benefit of creditors. Prior to that date, Hobson had made to the Fayette County National Bank his three promissory notes, described as follows: One was for three thousand dollars, and was signed by H. B. Hoyt, as surety; one was for six thousand dollars, and was signed by C. B. Minchin, as surety; and the third was for five hundred dollars, and was signed by Wm. Cowle, as surety. On the date named the notes were unpaid, and the property of the payee. In December, 1887, the three sureties named served upon the Fayette County National Bank a notice to sue upon the notes, or to permit them to do so, as provided by section 2108 of the Code. On the twenty-seventh day of that month, the bank named served upon each surety a paper, the body of which is as follows: "You are hereby permitted to bring suit in the name of the Fayette County National Bank upon a note made by Joseph Hobson and yourself to said Fayette County National Bank. A copy of said note is herewith furnished you. Said action to be brought at your own costs." On the day they received permission to sue, the sureties commenced three attachment suits in the name of the bank, one on each note. The petition in each action alleged that Hobson had disposed of his property with intent to defraud his creditors. Writs of attachment were duly issued against the property of Hobson, and served by levying them upon all the property of Hobson, and by garnishing his assignee.

On the second day of January, 1888, the three sureties named, and one James Cowle, a creditor of Hobson, began an action in equity in the district court of Fayette county against Joseph Hobson and his assignee, the First National Bank of Elkader, Katharine Bigler, Sidney Cobb and A. N. Hobson as defendants. The petition alleged that the assignment was fraudulent and void, for the reason that it gave preferences to certain creditors, and that certain mortgages given to Cobb and Bigler were a part of the assignment. On the thirty-first day of the same month, a second action in equity was commenced by the same plaintiffs against the same defendants. In that it was alleged that the assignment was void for the reasons set up in the first action, and, for the further reason that Hobson was not of sound mind when it was made. The plaintiffs asked that the assignment be decreed void. The First National Bank of Elkader was served with notice in said actions, appeared therein, answered, took depositions and incurred expense in defending. On the nineteenth day of March, 1888, the Fayette County National Bank filed with the assignee a claim against the estate of Hobson for the three notes specified. On the twentieth day of July, 1888, the First National Bank of Elkader, a creditor which had filed its claim as provided by law, filed exceptions to the claim of the Fayette County National Bank, and on the sixth day of February, 1889, filed an amendment thereto. On the fourteenth day of December, 1888, the plaintiffs in the first equity case dismissed it, and Hoyt dismissed the second so far as it concerned his rights. The case was tried as to the remaining plaintiffs, and the court found in favor of defendants, dismissing the petition. On the same day the plaintiffs in the three attachment suits dismissed them. The Fayette County National Bank appeared in each attachment suit before it was dismissed, by its attorneys, and objected to the withdrawal of the action as against the surety, and demanded judgment against the surety in each case, but did not object to the withdrawal as to the other defendant. The court overruled

the objection, and the plaintiff in each case dismissed it as a whole, the bank duly excepting. When permission to commence the action was given to the sureties, the bank knew that it was their purpose to attach the property of Hobson, and claim adversely to the assignment, and to seek to set it aside by legal process. The bank also knew of the action in equity about the time it was begun. It made no objection to any of the suits or proceedings excepting its objection to the withdrawal of the suits as against the sureties. The answer of the First National Bank of Elkader in the equity action denied any fraudulent preferences in the assignment, and denied that Hobson was of unsound mind when it was made. No appeal was taken from the judgment rendered in that action. On the thirteenth day of March, 1889, this cause came on for a hearing on the claim filed by the Fayette County National Bank, and the exceptions filed by the First National Bank of Elkader. The objections were overruled and the claim allowed. The First National Bank of Elkader appeals. Notice of appeal was served on the Fayette County National Bank and the three sureties.

I. Before the hearing was had, appellant moved to transfer the case made by the claim filed, and the exceptions thereto, to the equity side of the docket, for the reason that the exceptions raised equitable issues. The motion was overruled, and of that ruling appellant complains. The theory upon which the motion was filed is that the Fayette County National Bank should be compelled to exhaust the property of the sureties before resorting to the estate of the insolvent. The general principle in regard to marshaling securities is stated as follows: "If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the

1. EQUITY: insolvency: marshaling of assets.

rights, or operate to the prejudice, of the party entitled to the double fund." 1 Story, Eq. Jur., sec. 633. Although the rule is well established it will not be applied where it would work an injustice. *Dickson v. Chorn*, 6 Iowa, 20; 1 Story, Eq. Jur., sec. 560. In the absence of some special equity, it is not applicable to a case where one of the funds is the property of a surety. If a surety be compelled to pay the debt of his principal, he becomes his creditor by virtue of the payment, with the right of subrogation. In this case appellant's equities are not superior to the rights of the sureties, and the principal will not be required to exhaust their property before proceeding against the property of the principal debtor. See *Johns v. Reardon*, 11 Md. 465; *Ayres v. Husted*, 15 Conn. 504. The ruling on the motion was, therefore, correct. We do not determine whether, in view of the powers conferred by section 2121 of the Code, the motion could have been granted in any event.

II. It is insisted by appellant that the Fayette County National Bank was bound by the action of the sureties in commencing actions in its name, and that the institution of the attachment suits and actions in equity was such an election not to take under the assignment, but to proceed adversely to it, that the principal is now estopped to assert any claim under it. It is true a person cannot claim property under two inconsistent rights at the same time, and it is also true that, as a general rule, he should not be permitted to pursue different and inconsistent remedies at the same time; but, in this case, the suits commenced by the sureties were disposed of before the hearing on the claim in controversy. The attachment suits to which the Fayette County National Bank was a party were dismissed before trial, and only one of the actions in equity was prosecuted to final judgment, and one of the sureties withdrew from that before the final hearing. The fact that the Fayette County National Bank knew of the institution of the suits in equity did not make it in any sense a party to them, nor was it bound by the results. That was not

2. INCONSISTENT remedies: election.

true of the attachment suits to the same extent, but we are not required to determine in this proceeding what liabilities, if any, the Fayette County National Bank incurred by reason of its connection with them. It is sufficient to say that such connection was, to a certain extent, involuntary. It was compelled to bring suit, or to permit the sureties to do so, or release the sureties. It permitted suit to be brought by the sureties. Appellant was not prejudiced by the bringing of those suits. The claim in controversy is not disputed on its merits, and was filed within the time required by statute. To hold that, under the circumstances of this case, the Fayette County National Bank is estopped to assert its claim against the property of the principal debtor, would be most unjust. We think the proceedings hostile to the assignment should be treated as fully waived by the dismissal of the attachment suits, and that the right of the bank last named to file and prosecute its claim against the estate of the insolvent should be affirmed. See *Jewett v. Woodward*, 1 Edw. Ch. 195.

Other questions are discussed by counsel, but the conclusions already announced make it unnecessary to determine them. AFFIRMED.

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W. B. BROWN, Appellant, v. GRAND COUNCIL NORTHWESTERN LEGION OF HONOR *et al.*, Appellees.

Insurance: MUTUAL-BENEFIT ASSOCIATION: NON-PAYMENT OF DUES: FORFEITURE. A membership certificate in a mutual-benefit association provided for the payment of two thousand dollars to the beneficiary therein named, upon the death of the member, upon the condition, among others, that the member was in good standing at the time of his decease, which, under the constitution of the association, included the payment of dues of not less than one dollar per year, and fifty cents a year per degree of benefit held. No dues being paid under this certificate, the member was suspended, and subsequently died. After the member's decease, the beneficiary paid to the collector of the local council the amount of the

assessments and dues against the deceased, but the money so received was not paid to the council, and its receipt was unauthorized, and in violation of its constitution and by-laws. *Held*, that the association was not liable for the payment of the certificate.

Appeal from Boone District Court. — HON. S. M. WEAVER, Judge.

SATURDAY, OCTOBER 25, 1890.

MANDAMUS to compel defendants to make assessments for the payment of a benefit certificate issued by the Grand Council of the Northwestern Legion of Honor to William L. Brown, payable, in case of death, to his father, the plaintiff. There was a judgment for defendants. The plaintiff appeals.

J. A. Gallaher and *Timothy Brown*, for appellant.

E. E. Alverson, for appellees.

BECK, J.—I. The benefit certificate is in the following language:

"This certificate is issued to Companion W. L. Brown, a member of Ogden Council, number 52, Northwestern Legion of Honor, located at Ogden, Iowa, upon evidence received by said council that said companion is a second-degree contributor to the benefit fund of this order, and upon condition that the statement made by said companion in application for membership in said council, and the statements certified by said companion to the medical examiner, both of which are filed in the grand secretary's office, be made a part of this contract, and upon condition that the said companion complies in the future with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the grand council to govern said council and fund. These conditions being complied with, the grand Council of the Northwestern Legion of Honor hereby promises and binds itself to pay, out of its benefit funds, to William B. Brown (father) a sum

not exceeding two thousand dollars, in accordance with, and under the provisions of, the laws governing said fund, upon satisfactory proof of the death of said companion, and upon the surrender of this certificate, provided that said companion is in good standing in this order at the time of death, and provided, also, that this certificate shall not have been surrendered by said companion, and another certificate issued, in accordance with the laws of this order. In witness whereof the grand council of the Northwestern Legion of Honor has hereunto affixed its seal, and caused this certificate to be signed by its grand commander, and also attested by, and recorded by, its grand secretary, at Marengo, Iowa, this eighth day of September, 1887."

Section 31, of the constitution governing subordinate councils of the Legion of Honor, is as follows: "Sec. 31. Each member shall pay as dues, to commence with the date of admission, such sums as may be prescribed in the by-laws, which shall not be less than one dollar per year, payable in semi-annual installments, in advance, on the last stated meeting in June and December, and, in addition thereto, the sum of fifty cents per year per degree of benefit held, the same being the tax due the grand council, and to be payable in semi-annual installments; and a member shall not be in good standing, unless such dues and *per capita* tax are so paid." It is shown by the evidence that the person to whom the certificate was issued failed to pay any dues prescribed by this provision of the constitution; and it is also shown that he paid no assessment. The evidence further establishes that he was suspended for non-payment of dues; that, subsequent to his default and suspension, he died.

II. Under the plain conditions of the certificate upon which this action is brought, no recovery can be had thereon. The deceased was not in good standing in the institution, and under the explicit condition of the contract he forfeited all rights under it, and his father, the beneficiary, cannot recover thereon. It is said that no assessments against the deceased, on

account of the death of members, were due at his death. If this be admitted, it does not help plaintiff; for dues were payable as to which he made default before his death. It is shown that, after the death of his son, plaintiff paid to the collector for the local council the amount of assessments and dues against deceased. The money was not paid to defendants or either of them, and its receipt was not authorized, nor approved, nor sanctioned by either of them, and was not in accord with any provisions of their constitution or by-laws. The receipt of the money, therefore, passed for nothing.

These views dispose of the case, and require that the judgment of the district court be AFFIRMED.

L. D. VAN GORDER, Appellee, v. M. B. SHERMAN, Appellant.

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1. **Principal and Agent:** SALE OF REAL ESTATE: COMMISSION. Under an agreement with defendant, giving him the exclusive right to sell certain described real estate for one year for cash, and providing that he should have as commission any sum realized over and above an amount stated, the plaintiff within the time required found a purchaser who was able, ready and willing to buy said real estate at a price considerably in excess of the amount stated, and who agreed to pay in cash a sum equal to the amount to be paid the defendant, but was to have time for the payment of so much of the purchase money as was represented in the commission to be paid plaintiff. *Held*, that the agreement to give time for payment to the extent of plaintiff's commission was not out of accord with the contract of employment to sell, and that, the defendant having disabled himself from making a conveyance of the property by a prior sale, the plaintiff was entitled to recover of him the commission he would have realized had the sale been completed.

2. ——— : ——— : ——— : EXCESSIVE VERDICT : REMITTITUR. A new trial will not be ordered upon appeal because the verdict of the jury is excessive in a small sum, nor will a *remittitur* be ordered in such case where the error was not brought to the attention of the court below.

Appeal from Clayton District Court.—HON. L. O. HATCH, Judge.

SATURDAY, OCTOBER 25, 1890.

ACTION at law to recover for the breach of a contract for the sale by plaintiff of lands owned by defendant, for which plaintiff was to receive compensation prescribed by the contract. There was a judgment on a verdict for plaintiff. The defendant appeals.

W. E. Odell and *J. Larkin*, for appellant.

Dayton & Dayton and *Noble & Updegraff*, for appellee.

BECK, J.—I. The petition alleges, in substance, that defendant, being the owner of certain land conveyed to him by plaintiff in payment of a debt due from plaintiff to defendant, agreed in writing with plaintiff that he (plaintiff) should have the exclusive right for one year to sell the land for a sum not less than the amount of such debt, and any amount realized by such sale over and above the amount of the debt should be received by plaintiff as his own for compensation; and that, whenever plaintiff found a purchaser willing to pay for the land a sum equal to the debt and interest, defendant would convey it to such purchaser. It is further alleged that, within the time prescribed by the contract, during which plaintiff's agency for the sale of the land should continue, he found a purchaser able and willing to pay the amount of the debt and interest, and a large sum in excess thereof, but that defendant had before sold the land to another. The answer denies all the allegations of the petition, and, by an amendment thereto, it is alleged that plaintiff verbally authorized defendant to sell the land, and, in compliance with such authority, he did sell a part of it, and, therefore, was unable to make the conveyance required by the sale made by plaintiff.

1. PRINCIPAL and agent: sale of real estate: commission.

II. The defendant insists that the evidence fails to show that the contract relied upon by plaintiff as having been made by an agent of defendant was in fact made by the agent; that the agent had authority to

make such contract, or that it was ratified by defendant, and that the purchaser to whom plaintiff sold was able, ready and willing to purchase and pay for the land. Upon these points, it is insisted that the verdict is in conflict with the evidence. This position is argued at length by counsel. We think, upon all of these points, the verdict is sufficiently supported by the evidence. The direct and circumstantial evidence, as well as reasonable inferences from the facts, proved all points in that direction. We refrain, in accord with our custom, from entering into a discussion of the evidence, which would be profitable neither to the profession nor to the parties.

III. The plaintiff was authorized to sell the land for cash. By the terms of the sale he made, cash was to be paid so far as defendant was to receive the purchase money, and time was given on the sum to be paid to plaintiff, under the contract, as his compensation. Defendant insists that this was a violation of the contract, and the sale was, therefore, void. But it is difficult to see how it can be claimed that the terms of the contract extended to the money to be paid to plaintiff. It was his money, and he could at his pleasure relieve the purchaser from paying it. He surely could also extend to him time for paying it. The law will regard the condition of the contract requiring cash to extend only to the consideration to be paid under its terms to defendant, and that the parties did not have in contemplation the part of the consideration which was to be received by plaintiff, and, therefore, the condition of the contract under consideration did not extend thereto. Instructions given by the court to the jury in accord with these views are correct.

IV. Defendant insists that the verdict is excessive in the sum of twelve dollars and eighteen cents. For this small sum we shall not grant a new trial, and require each of the parties to spend in costs probably ten times as much as the amount of the error complained of by defendant. We shall not order a play which is not worth the candle. We might order a correction of the trifling error by

2. —: —: —: excessive verdict: remittitur.

remittitur, in order to attain exact justice, had it been pointed out in the court below ; but counsel for defendant show in their argument that, through an error of defendant in his motion for a new trial, the matter was not correctly brought to the attention of the court below.

The views we have expressed dispose of certain objections to the instructions given to the jury. Other objections to the instructions and to rulings upon the admission of evidence are not of a character to demand attention. We reach the conclusion that the judgment of the district court ought to be AFFIRMED.

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MARCELLUS SOLOMON, Appellee, v. FINDLEY MCLENNAN, Appellant.

Attachment: DAMAGES : ATTORNEY FEES. The defendant recovered judgment against the plaintiff for damages upon an attachment bond, and for court costs, but through oversight made no application for the taxation of attorney fees. After the judgment and cost had been paid, a motion for attorney fees was filed. *Held*, that the application came too late.

Appeal from Cass District Court.—HON. N. W. MACY, Judge.

SATURDAY, OCTOBER 25, 1890.

THIS was an action in attachment to recover damages alleged to have been sustained through the negligence of the defendant in permitting a stallion to escape and run at large. The defendant filed a cross-petition, claiming damages upon the attachment bond. There was a trial by jury, and a verdict and judgment for the defendant for five dollars. The ordinary costs for witness fees, court costs, and the like, were taxed to the plaintiff, and the judgment and costs were paid.

Afterwards the defendant filed a motion for an allowance of attorney's fees. The motion was overruled. A petition was also filed asking that attorney's fees be taxed, and the petition was, on the motion of the plaintiff, stricken from the files. The defendant appeals.

L. L. Delano and *J. C. Bryant*, for appellant.

Willard & Willard, for appellee.

ROTHROCK, C. J.—The trial was had, and judgment entered, at the February term, 1888, of the district court. Afterwards the judgment and costs were paid. On the fifteenth day of February, 1889, the defendant made his application to have an attorney's fee taxed. The excuse for not making the application when the judgment was entered was that by "some oversight there was no fee taxed for the defendant's attorney." We must presume that this oversight was not that of the court or the clerk. Of course the court would not, of its own motion, tax the fee, and the clerk could not tax it because he had no power to determine the amount. We have then the case of a party failing to make any claim for an attorney's fee until nearly a year after judgment, and after the whole controversy had been closed by payment in full of the judgment and costs. It is true that it is provided, by section 2961 of the Code, that, in an action on an attachment bond, in addition to actual damages sustained, recovery may be had for "reasonable attorney's fees, to be fixed by the court." Now, if the party entitled to recover the fees by some oversight makes no claim for attorney's fees until after payment of the judgment and costs, it would seem that no good reason can be given for permitting the litigation to be opened up afresh, to allow evidence to be introduced to enable the court to fix the amount of an attorney's fee, and enter up another judgment in the case.

The judgment of the district court is AFFIRMED.

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H. H. SICKLES, Appellee, v. DALLAS CENTER BANK, Appellant.

1. **Equity: ACCOUNTING: PLEADING: EVIDENCE.** In an action in equity for an accounting with defendant, based upon the latter's possession of certain promissory notes delivered to it as collateral security for a debt owing it by plaintiff's assignor, the plaintiff alleged in his petition that, after the payment of defendant's claim, a large number of notes yet remained in its hands, "which were valuable," and that, upon demand, defendant had refused to surrender or account for the same. *Held*, that under a general denial in the answer, the defendant was entitled to show that the notes were of no value at any time.

2. ——— : ——— : **REOPENING CAUSE FOR ADDITIONAL EVIDENCE.** The reopening of an equity cause, after its submission to the court for judgment, for the introduction of further testimony to correct an oversight or mistake, is a matter within the discretion of the trial court, and, in the absence of any showing of prejudice, its action will not be disturbed upon appeal.

3. ——— : ——— : **DECREE.** Under the evidence, *held*, that the plaintiff was entitled to a decree requiring defendant to surrender the notes in controversy, and for costs of suit in the district court. [GRANGER, J., *dissenting.*]

Appeal from Dallas District Court.—HON. J. H. HENDERSON, Judge.

MONDAY, OCTOBER 27, 1890.

THIS is an action in equity for an accounting for certain promissory notes, and for judgment for the amount thereof. There was a trial on the merits, and a judgment for the plaintiff. The defendant appeals.

D. W. Woodin, for appellant.

Cummins & Wright and *R. S. Barr*, for appellee.

ROTHROCK, C. J.—I. In March, 1883, one F. Hubbard was indebted to the Dallas Center Bank in the sum of about one thousand and thirty-six dollars, and the bank held, as collateral security for said debt, certain promissory

1. EQUITY: accounting: pleading: evidence.

notes on third persons, payable to Hubbard, and pledged by him to the bank as security. At the same time the plaintiff herein, as agent of the Moline Wagon Company, held a claim against said Hubbard, and obtained from him an assignment of the notes held by the bank. This assignment was taken as collateral security for the debt due from Hubbard to the Moline Wagon Company, and it was subject to the rights of the bank as a holder of the collateral. Afterwards, Charlotte Hubbard, the wife of F. Hubbard, deposited certain notes with the bank as additional collateral security for its claim. These notes were to be applied in payment of any balance of the debt which could not be realized from the notes previously assigned to the bank by Hubbard. The notes deposited as collateral by Charlotte Hubbard were afterwards, at the suit of the Grand Detour Plow Company, adjudged to be the property of F. Hubbard, and held by his wife in fraud of his creditors. The debt due to the bank was fully paid in October, 1884, and after such payment the bank still held a part of the notes assigned by Hubbard, and it also held one hundred and seven dollars collected from the notes deposited by Mrs. Hubbard. This last sum of money is not in controversy in this appeal. The Grand Detour Plow Company intervened in the action, and the said sum of one hundred and seven dollars was adjudged to belong to it, and no appeal has been taken from this part of the judgment. The controversy is limited to the correctness of the judgment so far as it applies to the notes assigned by F. Hubbard to the bank. At the time of the trial in the district court, there was, of the notes originally assigned to the bank, an unpaid balance of four hundred and eighty-five dollars and forty-seven cents, for which amount judgment was rendered for the plaintiff.

The defendant, by its original answer, made no claim to the notes, and averred a readiness to deliver them to the person to whom they belonged, and alleged that it had deposited the same with the clerk of the district court. It was averred in the petition that the plaintiff demanded

the notes of the bank, and that the bank refused to deliver the same to plaintiff, and refused to account to the plaintiff in any manner for the notes, and refused to give the plaintiff any statement of what notes had been paid. The only allegation of the value of the notes contained in the petition was as follows: "3. That there were a large number of notes then in the hands of said bank, aggregating some fourteen or fifteen hundred dollars, which were valuable, and were held by said bank as collateral security for certain notes given by said Hubbard to the bank, upon which there was then due less than seven hundred dollars." The prayer of the petition was as follows: "Wherefore plaintiff prays that there be an accounting; that the defendant be required to show the amount of notes originally in its hand as collateral, how many have been paid, the balance in its hands in money or notes; that plaintiff have judgment against the defendant for the amount of notes originally in its hands more than sufficient to pay the claim for which they were held as collateral, with interest and costs, and for such other, further and different relief as to equity and the court shall seem just."

It will thus be seen that the plaintiff averred in the petition that the notes "were valuable," and demanded judgment against defendant for the amount of the notes in its hands over and above what was sufficient to pay the claim of the bank. In addition to the averments of the answer above referred to, there was a general denial of "each and every other allegation in said petition contained." There was no admission of the value of the notes. The cause went to trial, and the main contention between the parties was whether the bank had wrongfully converted the balance of the notes by refusing to account for the same, and by a refusal to deliver them to the plaintiff. The evidence was closed, and the cause submitted to the court. At that stage of the case the evidence showed a wrongful conversion. There can be no question upon that point. There was no bad faith shown by the bank, but it had refused upon

demand to deliver the notes. A conversion may be shown by a wrongful detention. *Cutter v. Fanning*, 2 Iowa, 580. The fact of a conversion may be established by proof of a demand and refusal. 2 Greenl. Ev., sec. 644.

The cause was submitted to the court on the fifth day of December, 1888. At that time the court stated that the plaintiff was entitled to recover the face value of the notes in question, and that the question as to whether the plaintiff was entitled to a judgment for the one hundred and seven dollars claimed by the Grand Detour Plow Company would be taken under advisement. On the next day, the defendant made an application to be permitted to introduce additional evidence relative to the value of the notes. It was shown that the evidence was omitted by oversight and mistake. It was objected by the plaintiff that the motion to reopen the case was filed too late, because it had been finally submitted. The court sustained the motion, and further evidence was taken which shows without conflict that the notes in controversy were of no real value at any time. The order sustaining the motion was as follows: "The motion for the reopening of the case is considered, and the court makes its ruling as a part of the records in this case, in addition to the journal entry. The chronological statement as to the disposition of the case is in the main true,—that it had been submitted to the court, and the court had made its announcement, saving the consideration as to the one question. The showing made of oversight is amply sufficient to warrant the introduction of additional testimony, and the only hesitancy heretofore has been the fact that it has been the opinion of the court that the same was not material to the issue tendered in this case. The case being an equitable action tried to the court, all the matters should be entered of record. The court will permit the examination of the witness Hoops touching the value of the notes under the following terms." [The court then stated certain rules under which the evidence should be given.] We think that

the issue as to the value of the notes was directly made. As we have shown, the petition averred they "were valuable," and the answer by the general denial put that averment of the petition directly in issue.

II. We come now to consider what we regard as the only real question in the case. It is this: Was it within the power of the court, after the cause had been fully submitted, to entertain a motion to reopen the case, or in other words, in effect, to set aside the submission and take additional evidence? It is true the motion did not, in terms, ask that the submission be set aside, but that was just what was done. It was withdrawn, and the case was reopened. Section 2799 of the Code is as follows: "At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege." If the court below had refused to sustain the application, it is altogether probable that this court would have sustained the ruling as being within the legal discretion of the court. In *Baker v. Jamison*, 73 Iowa, 698, which was an action in equity, the plaintiff moved the court to set aside the submission and permit the introduction of additional evidence. The court overruled the motion, and the ruling was sustained, not on the ground that the court had no power to entertain the motion by reason of the above cited statute, but because no abuse of the sound discretion of the court was shown. In *Eggspieller v. Nockles*, 58 Iowa, 649, which was also an action in equity, after the evidence had been introduced, the cause submitted, and the court announced a decision in favor of the defendant, the attorney for plaintiff asked to be allowed to put the plaintiff on the stand as a witness. The defendant objected, his objection was overruled, the testimony of plaintiff and other testimony was taken, and the court reversed its former decision, and rendered a decree in favor of plaintiff. One ground of the objection was that "the cause had

2. —: —: reopening cause for additional evidence.

been submitted and a decision rendered." This court approved the ruling, saying that "it was within the discretion of the court, under the circumstances of the case, to permit the plaintiff to be called as a witness. No abuse of discretion appears." The case at bar was an equity cause. The taking of additional evidence was not embarrassed by the case having been submitted to a jury. Counsel for both parties were present at every stage of the proceedings, and no prejudice whatever is shown. We think that in furtherance of justice there was no error in permitting the evidence to be introduced. If we should hold there was error, we would overrule the case last above cited, and we do not think that such a result is desirable. It is true the statute contemplates that the additional testimony should be offered before the cause is finally submitted, but the submission cannot be said to be final if an application be promptly made to set the submission aside, or, what amounts to the same thing, if a timely application be made to correct a mistake or omission by the introduction of additional evidence. Whether it is a final submission may be safely left for the trial court to determine. The court having admitted the evidence, it was within the issue, and should have been considered in fixing the amount of the judgment. As we have said, the record, including the additional evidence, shows that the notes were of no value. It is true that, in an action for the conversion of promissory notes or choses in action, the amount of the notes or other instruments is *prima facie* the measure of damages, but it is competent for the defendant in such case to show the insolvency of the makers of the notes as affecting the measure of recovery, and as showing that they are of no value. *Latham v. Brown*, 16 Iowa, 118; *Callanan v. Brown & Co.*, 31 Iowa, 333; *Sadler v. Bean*, 37 Iowa, 439.

III. The above considerations lead to a reversal of the judgment. However, as the cause is triable anew in this court, and we have full power to mold the decree so that it will protect the

3. —: —: decree.

rights of the parties, it is ordered that the notes in controversy be delivered to the plaintiff to the end that he may, if so advised, attempt to collect them, and, as the defendant was liable to the plaintiff for nominal damages for the conversion of the notes, the judgment for costs in the court below will not be disturbed. The plaintiff will be required to pay the costs of this appeal.

This disposition of the case renders it unnecessary to determine whether an amendment to the answer which was filed after the additional evidence was introduced should have been stricken from the files. The amendment was wholly unnecessary. It presented the question that the notes were of no value. As we have seen, that issue was made by the original answer. Some question is made by counsel for appellee as to whether the record was preserved so as to present the appeal to this court. It appears to us that the objection made by counsel is not well taken. The judgment of the district court is REVERSED.

GRANGER, J. (*dissenting*).—I cannot give my assent to the rule announced in the second division of the majority opinion, because I believe it to be a grave error, and in plain disregard of a provision of the statute. Code, sec. 2799. The ruling reaches beyond the case at bar, and affects the general practice of the state. I differ radically with that opinion as to what constitutes the final submission of a cause. I do not understand the opinion to claim but that, if the cause had been finally submitted before the application to introduce additional testimony, it would have been error to permit it. The opinion says: "It is true the statute contemplates that the additional testimony should be offered before the cause is finally submitted." A legitimate inquiry, then, is, when is a cause finally submitted? I think it is when submitted to a jury or the court for final verdict or judgment; and that had been done in this case, and, so far as this appeal is concerned, the judgment announced. But the majority opinion says: "The submission cannot be said to be

final if an application be promptly made to set it aside." Then would there ever be a final submission if such applications should be promptly made? When the legislature said the court might permit the taking of further testimony before final submission, it gave to the court a discretion in that respect before such submission, but evidently intended that it should not extend beyond the submission. But the majority opinion says: "Whether it is a final submission may be safely left for the trial court to determine." The rule then is that such testimony may be taken at any time if the trial court shall say the cause has not been finally submitted. It follows that there is no given state of facts that constitute a final submission within the meaning of the statute under consideration, and that there is no limitation upon the right of the court to admit such evidence. Now in this case, there is no question but that the parties submitted the case to the court, intending that it was final, and for the purpose of a final judgment. The record bears unmistakable evidence that such was the intention, and there is not a word in record or argument to dispute it. The majority opinion then, in effect, gives the rule that, where parties intend a final submission, it is not final so as to exclude additional evidence if the trial court shall otherwise hold. To read the section should at once suggest the legislative thought to those familiar with judicial trials. The submission of a cause follows its presentation to the court by the introduction of the testimony, and the arguments as to the law and facts. Before the trial, in the settlement of issues, and during the trial, upon motions and questions of evidence, are submissions known in law as interlocutory, not final, submissions; and, after the full presentation of the case, comes the final submission, which is the one contemplated by the statute in question. The word *final* is not intended to distinguish the last submission from others intended to be final, but to distinguish it from other submissions occurring before the trial is completed; and is that submission always known and recognized as final. This

view gives to the section effect; the other entirely defeats it. Omit from the section the words "before the cause is finally submitted," and you have, in effect, the rule given in the majority opinion. Rules of construction require that the words shall have a meaning, if susceptible of it, and these certainly are.

It would seem strange under the statute in question, after the verdict of a jury, if the court, upon such an application, should set aside a verdict or submission, and permit the taking of further testimony; and it would be equally as sound an interpretation of the law as in this case; for the section limits it to a submission to a "court or jury," and makes no distinction as to the kind of proceeding, whether equitable or ordinary, and it is a part of the Code of Civil Practice. The fact that embarrassment might result could not, in my judgment, influence the determination or fact of its being a final submission. The majority opinion cites, as precedents for its holding, the cases of *Baker v. Jamison*, and *Eggspieller v. Nockles*. In the first case cited, the court did not cite the statute as authority for its holding, but it could have done so with equal propriety; and the case is not authority for any view of the statute, for it makes no reference to it. The latter case cited does hold to the rule of the majority opinion barring one fact, that the holding is not based on the statute. It is manifestly certain that the holding in that case, as well as the comments in the case of *Baker v. Jamison*, were made without the attention of the court being called to the section in question, and that the apparent conflict is the result of a mere inadvertence. The court would surely never have attempted a construction of a statute or based a ruling on it without a reference to it. Neither opinion has a remote reference to any statute as a basis for the holding. I do not consider either case as an authority upon the question, and I do not think the court should hesitate to follow the language of the statute, without reference to the cases cited. The district court seems to have admitted

the evidence alone for precautionary reasons, as the cause was triable anew in this court, and then disregarded it because improper, as I think this court should do, and affirm the judgment.

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J. C. SHOCKLEY, Guardian, Appellant, v. W. L. VAN EATON, Appellee.

1. **Promissory Note**: PAYMENT: EVIDENCE. In an action upon two promissory notes, held by plaintiff as guardian, the defendant pleaded payment, and alleged that the notes were not surrendered because of the representations of plaintiff that the same were lost or mislaid. The plaintiff admitted that the notes had been mislaid, but alleged that it was through fault of the bank where they were deposited, and denied payment. *Held*, under the issue thus presented, that defendant might show, that about six years after the alleged payment the plaintiff voluntarily executed a trust deed as additional security to the sureties upon his bond as guardian, and all the facts leading to its execution; also the reports made by plaintiff, as guardian, showing how he treated the notes in question; also such accountings as tended to show whether the money had been received; and the failure of defendant at times to make reports of his doings as required by law.

2. ———: ———: ———. Under such an issue, evidence of plaintiff's conduct in other transactions, entirely independent of that in controversy, indicating a defective memory and liability to mistake, is not competent.

3. ———: ———: ———. Neither is it competent for the defendant to show in such case that the plaintiff was sick and affected mentally about five years after the date of the alleged payment.

Appeal from Fremont District Court.—HON. GEORGE CARSON, Judge.

MONDAY, OCTOBER 27, 1890.

ACTION on two promissory notes. Defense of payment. There was a verdict and judgment for defendant, from which the plaintiff appeals.

Geo. E. Draper, *Wm. Eaton*, *A. R. Brewer* and *P. H. Hoop*, for appellant.

James McCabe, for appellee.

GRANGER, J.—The plaintiff is one of the guardians of the minor heirs of J. H. Fletcher, deceased, and as such received from the defendant, on the eighth of March, 1881, two promissory notes of one thousand dollars each, and each payable on or before one year from date. The defendant's claim is that he paid one of the notes in September, and the other in October of the same year, to the plaintiff, and the notes were not delivered because plaintiff represented that they were lost or mislaid. The defendant in his testimony says he paid the notes to plaintiff at his (plaintiff's) office, or place of business, and that no other party was present or witnessed the payments. The plaintiff is explicit in his denial of the payments. Plaintiff, in his testimony, states that the notes, soon after their execution, were placed in the bank, and were misplaced, and could not be found till in 1885; and in September, 1881, he communicated the fact of their being lost or misplaced to the defendant. The assignments in the case, barring a complaint as to the conduct of the attorney for the defendant on the trial, are as to the action of the court in admitting and excluding evidence. The only direct testimony is by the parties, and it is contradictory. The issue is upon an allegation of payment and a denial. Our considerations must be as to what circumstances may be proven to aid the parties in such a case.

I. The payment is claimed to have been in 1881, and in 1887 the plaintiff made to one Hutchinson a trust deed on his property as security to the sureties on his guardianship bond against loss. The investigation at the trial led to an examination of the reports and accounts of plaintiff as guardian, and no claim is made of any deficit, unless the notes have been actually paid. Defendant offered,

1. PROMISSORY note: payment: evidence.

and was permitted to put in evidence, the trust deed of which appellant complains. It is to be remembered that the notes were in the bank, and there is a dispute as to the cause of their absence from the other papers of the estate, it being plaintiff's claim that they were misplaced by some one in the bank, and were not discovered till some time in 1887, and it is claimed by defendant that there was a purpose in the notes being separated, and that they were not misplaced. Of course this state of facts under the issue would open a somewhat wide door of inquiry, and all conduct of the plaintiff in reference to the notes, after the alleged payment, would be material. Plaintiff says the first notice he had of defendant's claim that the notes were paid, was in December, 1887. The deed was made October 18 before, and why? It seems to have been voluntarily prepared by plaintiff, and, as disclosed by the record, without any reason therefor, unless it was in some way induced because of these notes. It was not because of a claim of payment, for such a claim had not been made. Then, if we concede that it was induced in some way because of the notes, would not the facts as to it be material? We think so, and that the admission of the deed in evidence was proper, after which all the facts leading to its execution might be shown.

It should be stated, to avoid undue inference hereafter, that our statements are only from the record, in which no effort was made by plaintiff to show why the deed was made. With our statements in this connection we need not devote time nor space to objections as to the reports of plaintiff as guardian. Such reports, in so far as they show how these notes were treated by plaintiff, are proper, and also such accountings as might tend to show whether or not the money was received.

There is a complaint that defendant was allowed to prove that there had been a neglect by plaintiff to make reports as required by law. We do not think this was error, because it would be for the jury to say if there was a purpose in such neglect, and if it was induced

because of the situation as to the notes. But it must be shown to have some relationship to the question of payment; as, was it done to conceal the real situation?

II. The plaintiff in a transaction with the administrator of the Singleton estate had been mistaken as to a five-hundred-dollar payment, it appearing that plaintiff had given a receipt for the money and entered the payment in a book, but had neglected to indorse it on the note, and had afterwards, being guided by the note, been mistaken as to the payment until he saw the receipt. On cross-examination of plaintiff, defendant was permitted to call out these facts as showing, we suppose, that he was mistaken in this case. But it was error to do so. The transactions were entirely independent; and, while proper inquiries might be made on cross-examination as to his memory, it was not proper to inquire into such a transaction.

2. THE SAME.

III. Mr. George E. Draper was a witness for the defendant, and his evidence disclosed that he made out a report for plaintiff in December, 1887, and that, at that time, the plaintiff was sick, and the following appears in the record on the redirect examination: "*Q.* You were asked about the health of Mr. Shockley at this time. What was the matter with him? *A.* I don't know.

3. THE SAME.

"*Q.* He was crazy, wasn't he? Wasn't this at the time he was feigning to be crazy,—while the school district township were demanding of him a report? (Objected to as immaterial.) Court. He may answer as to his condition of health. (Plaintiff excepts.) *A.* I am not an expert on disease.

"*Q.* Well, that is the explanation he made, wasn't it, that his accounts had been in such a condition that he had been in such a worry over them that he was now unfit for business, and it had injured his health? (Objected to as immaterial, incompetent and not re-examination.)

"*Q.* Describe to the jury his condition,—how he looked, and how he acted. (Objected to as immaterial. Overruled. Plaintiff excepts.) *A.* I do not wish to

be understood as testifying that Shockley was sick. He simply seemed to be unstrung, and not himself at the time. I was doing this work. Whether he had this disease or that, or whether he had any or not, I don't know anything about it."

This was erroneous. The testimony could in no manner tend to show the facts as to payment. It was some five years or more after, and the illness a mere temporary one, and counsel for appellee does not, in argument, attempt to justify the ruling. If it had been a mere incidental reference to his health, it might not be prejudicial, but the record evinces a purpose in the testimony that is unwarranted. One cannot well read the record of the case without believing that there was an effort to directly or indirectly bring to the attention of the jury faults and facts in the life of the plaintiff having no bearing on the issues, from which the jury might guess that the plaintiff, because wrong in other matters, is wrong in this. Conclusions of fact in legal proceedings should not be arrived at by such a method.

IV. A vigorous complaint is made as to the conduct of appellee's counsel on the trial, which we do not consider because of doubts as to a suitable condition of the record for that purpose. These rulings and suggestions will, we think, be sufficient to indicate to the court our views as to the character of testimony admissible on another trial of the issues, for which the cause must be remanded. REVERSED.

GEORGE W. HEARD, Appellee, v. H. H. WILDER, Appellant.

1. **Partnership: AGREEMENT: ACCOUNTING: EVIDENCE.** An agreement made by defendant for the purchase of certain real estate, recited, that he had secured the same for himself and the plaintiff herein, but was signed by himself alone. Immediately afterwards the plaintiff and defendant went together to a real-estate agent's

office, where a list of the property was made by the plaintiff for the agent, and signed by both parties. Afterwards, the defendant sold the property at a large advance, and plaintiff brought this action for an accounting, claiming that defendant's purchase was made under a verbal agreement between them to buy the property upon their joint credit for a resale, and share equally in the profits or losses. The defendant claimed that said agreement was made after the purchase, upon condition that plaintiff would advance one-half the purchase price. Up to the time of the resale, no part of the purchase price of the property, save the sum of five dollars paid to bind the bargain, had been paid. *Held*, that the circumstances attending the transaction supported the claim of plaintiff, that the agreement was made before the purchase by defendant, and that it was the intention of the parties that each was to contribute equally to the expenses of the purchase, and to share equally in the profits or losses of the enterprise.

2. ——: ——: ——: ——. The fact that, up to the time of the resale, the plaintiff had not contributed, nor offered to contribute, anything to the enterprise, *held* to be no evidence against the finding that plaintiff and defendant were partners in the transaction, as up to that time no part of the purchase price of the property, save the payment of five dollars to bind the bargain, had been paid.

Appeal from Woodbury District Court.—HON. G. W. WAKEFIELD, Judge.

MONDAY, OCTOBER 27, 1890.

ACTION in equity for an accounting and settlement of an alleged partnership. The answer was a general denial. A decree was entered in favor of the plaintiff, from which the defendant appeals.

J. P. Blood, for appellant.

T. G. Henderson, for appellee.

GIVEN, J.—I. On February 26, 1887, the defendant purchased of Col. Orr eight lots in central Sioux City, at the agreed price of eight hundred dollars per lot, payable one-third down, the balance in one, two and three

1. PARTNERSHIP: agreement: accounting: evidence.

years. Col. Orr not being ready to make conveyance for some days, the cash payment, less five dollars, paid to bind the bargain, was withheld until the conveyance would be made. During that time the defendant sold the lots on the same terms at an advance of twenty-five hundred and eighty-seven dollars and fifty cents. The defendant executed to the plaintiff a writing as follows:

"SIOUX CITY, IOWA, February 26, 1887."

"This is to certify that I, H. H. Wilder, have this day secured the lots, one to eight, block 24, central Sioux City, on Fourth street, from Col. Orr, for myself and Geo. W. Heard, at eight hundred dollars per lot; one-half cash, balance on one, two and three years, at eight-per-cent. interest.

"H. H. WILDER."

Defendant accompanied the plaintiff to the office of Clark Bros., real-estate agents, and was present when plaintiff left with the agents a list of said lots for sale, the list being signed by C. W. Heard and H. H. Wilder.

The parties agreed that a contract was made between them with respect to these lots, but differed as to when it was made, and what it was. Plaintiff alleges that the agreement was prior to the purchase from Col. Orr and with a view to that purchase; that it was agreed that they would purchase the lots for speculation upon their joint credit, and for their mutual use and benefit, the title to be taken to them jointly, and to sell the property as soon as mutually agreed upon, they sharing equally in the profits or losses. Defendant contends that the agreement was made after he had purchased the lots on his own credit and account, and that it was agreed that if the plaintiff would put up half of the money, and make a sale, he was to have half the profits.

The preponderance of the evidence is in favor of the conclusion that the parties entered into their agreement prior to the purchase from Col. Orr, and that they agreed as claimed by plaintiff. They agree that the

price of the lots was a subject of conversation between them, the plaintiff stating that they decided before the purchase not to pay nine hundred dollars per lot, but that they would purchase at eight hundred dollars. Defendant contends that this conversation was after the purchase, and that it occurred in his relating what had passed between Col. Orr and himself. During the negotiations with Col. Orr, defendant expressed a desire to consult some one before closing the bargain. There was no other person than the plaintiff interested, or with whom there would seem to be any occasion for consulting. If the purchase had been made, there was no occasion for discussing the price. The language of the writing given by defendant to plaintiff indicates quite clearly that the agreement between these parties was made before the purchase. In that writing the defendant certifies that he has secured the lots from Col. Orr for himself and G. W. Heard at eight hundred dollars per lot. To have agreed as claimed by plaintiff was reasonable under the circumstances. Neither party, then, anticipated that sales could be made so as to meet the cash payment to Col. Orr. They no doubt anticipated that it would be necessary to advance means to carry out the contract of purchase. It was reasonable, therefore, that they should agree to contribute equally to the making of the payment. The agreement as claimed by defendant is very indefinite, and out of the usual course of business. It was not only unusual, but unreasonable that the plaintiff should agree to furnish half the money without any provision for its repayment, and to receive no part of the profits unless he made a sale. We reach the conclusion, that prior, and with a view, to the purchase from Col. Orr these parties agreed to make said purchase jointly for the purpose of resale, and that each was to contribute equally to the expenses of the purchase, and to share equally in the profits or losses of the enterprise.

II. We next consider whether the agreement was such as to constitute a partnership, appellant's

2. THE same.

contention being that it was not an agreement of copartnership, and, therefore, the plaintiff is not entitled to an accounting in equity.

But few subjects are more frequently before the courts than the inquiry as to what is a partnership, and whether given states of fact constitute a partnership. Extended citations of authorities are unnecessary. We accept *Chase v. Barrett*, 4 Paige, 160, cited by appellant, as a correct statement of law. It is therein stated "that to constitute a partnership as between the parties there must be a joint ownership of partnership funds according to the intention of the parties, and an agreement, either expressed or implied, to participate in the profits or losses of the business, either ratably or in some other proportion to be fixed upon by the copartners." Our inquiry being as to whether the agreement created a partnership as between the parties, we need not notice the distinctions that arise where the inquiry is as to third persons. According to the agreement as we find it to have been, the lots were to be purchased for the joint benefit of both, and, although plaintiff was unknown to Col. Orr in the contract, yet as between these parties plaintiff acquired an ownership in the lots. True, he never contributed any money towards the purchase, nor did the defendant except the five dollars, because contribution became unnecessary by reason of the successful resale of the lots. If the enterprise had resulted in loss, clearly the defendant could have held the plaintiff to share in the loss under the agreement as we find it to have been, and it follows that the enterprise having been successful the plaintiff is entitled to share in the profits. There was a joint ownership of the partnership property, and an agreement to share equally in the profits or losses. The case is readily distinguishable from *Iliff v. Brazil*, 27 Iowa, 131, and *Ruddick v. Otis*, 33 Iowa, 402, cited by plaintiff. In the former case the threshing-machine purchased in common was not bought or used for partnership purposes, and in the latter case Otis & Snow were not to

bear any portion of the loss if loss occurred. It is urged upon the one hand that plaintiff never offered to contribute anything to the purchase, and upon the other that no demand was ever made upon him. The successful resale rendered it unnecessary that he should contribute, or that any demand should be made.

Our conclusion is that the decree of the district court should be AFFIRMED.

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A. G. RICHARDS, Appellant, v. CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY, Appellee.

1. **Railroads**: CROSSING: LICENSE: PERSONAL INJURY. Conduct on the part of a railroad company amounting to an invitation or licence to *cross* its tracks at a point where there is no street or public highway is not to be construed as a license to *walk along* its tracks, and one so walking cannot claim of the railroad company the duty of exercising ordinary care in the movement of its trains to prevent his injury, even though said tracks have been habitually so used by the public, and without disapproval on the part of the company.

2. ———: ———: ———: ———. The fact, that the point where one is injured, while so walking upon the railroad company's right of way and between its tracks, is used as a public crossing over said tracks, will not impose upon the railroad company any increase of duty to such person.

3. ———: ———: ———: ———: CONTRIBUTORY NEGLIGENCE. The plaintiff in going from his home to the post-office, which was situated at a point northeast of the plaintiff's house, and on the east side of said railroad, instead of going east over defendant's tracks at the street crossing to the street on which the post-office was situated, and then going northward to his destination, his most direct route, went east to a point on defendant's right of way, and then turned northward, walking in a space eight feet wide between tracks. Just before plaintiff crossed the west track of the two an engine and caboose passed him going south, and soon after turning north an engine and stock train went south on the east and main track. The distance from plaintiff to where the west track joined the main track was only one thousand feet, and plaintiff knew that on account of the stock train the engine and caboose could only go that distance. He looked back once, and saw the engine and caboose still going south. The engine, however, after drawing the caboose south on the west track for a short distance,

backed on the same track, finally giving the caboose a "kick," propelling it northward at a speed of ten or twelve miles an hour. When the plaintiff had gone about five hundred feet, and while walking near the west track, the caboose struck him, throwing him violently to the ground in such a manner that one foot was thrown on a rail and crushed. *Held*, that, conceding the defendant to have been negligent, the plaintiff was guilty of contributory negligence, and was not entitled to recover damages for the injury sustained.

Appeal from Chickasaw District Court.—HON. L. O. HATCH, Judge.

MONDAY, OCTOBER 27, 1890.

ACTION to recover damages for personal injuries alleged to have been wrongfully caused by defendant. After the evidence for plaintiff had been submitted, the court sustained a motion to instruct the jury to return a verdict for defendant. A verdict was accordingly returned, and judgment rendered in favor of defendant. The plaintiff appeals.

Springer & Clary, for appellant.

Fouke & Lyon and *Lusk & Bunn*, for appellee.

ROBINSON, J.—Plaintiff received the injuries of which he complains, in October, 1887, in the town of Elma. He was at that time nineteen years of age. While walking near a track of defendant, he was struck by a caboose, and thrown violently to the ground in such a manner that one foot was thrown on a rail and crushed, making amputation of the injured limb below the knee necessary. Other injuries were also received. The accident occurred at a point which was generally used by the inhabitants of Elma as a crossing, but it was not in a street, nor other duly established public way. Plaintiff was not in the service of defendant, but claims that he was rightfully in the place where he was injured, and that his injuries were caused solely by carelessness and negligence on the part

of defendant in the manner in which the car was moved, in not providing a person to guard the tracks, in not giving proper warning of danger, and in moving the car at a high rate of speed.

I. A street of Elma, called Busti avenue, extends from north to south, and is intersected on the west side by Main street. The business of the town is largely done on these streets. The main track of defendant crosses Main street from the south a few feet west of Busti avenue, and extends thence in a northerly direction, forming with the avenue an angle of less than thirty degrees. A track, known as the "lead track," leaves the west side of the main track at some distance south of Main street, and extends thence northward, parallel to and about eight feet from the main track, until after it reaches the depot. Several short tracks leave the west side of the lead track north of Main street, and extend in a northwesterly direction, each with the lead track forming an acute angle. Four such tracks leave the lead track between Main street and the south end of the depot platform. There is no street, or other regularly established crossing between Main street and the depot, but the inhabitants of Elma have habitually crossed the tracks in passing from the northern part of Busti avenue to the western part of Main street, at a point just south of the depot platform. Another route extended eastward on Main street to a point between the main and lead tracks, and thence northward between these tracks to the crossing at the south end of the platform already described. The duly established way was along Main street and Busti avenue. The post-office was on the east side of the avenue, at a point northeast of the depot. On the day of the accident, plaintiff started from his home in the west part of the town to go to the post-office. He went eastward along Main street until he had crossed the lead track, and then turned, and walked northward between that and the main track. Just before he reached the lead track, an engine and caboose went south on that track, and were fifteen or twenty paces

1. RAILROADS: crossing: license: personal injury.

south of him when he crossed the track. When he reached a point forty or fifty paces north of Main street, an engine passed him going south on the main line, drawing a stock train. Another engine was switching on a sidetrack west of him. He walked northward between the tracks until near the south end of the depot platform, which is about five hundred feet north of Main street. As he approached that point, his attention was attracted by a boy some distance in front of him, who was trying to warn him of danger by waving his hands; but the signals were not understood, and plaintiff was struck in the back by the caboose, at the place described, while walking east of, but near to, the lead track. It appears that the engine had drawn the caboose some distance south of Main street on the lead track, and had then backed on the same track, finally giving the caboose a "kick," which propelled it northward until it reached plaintiff at a speed of ten or twelve miles an hour.

The plaintiff contends that he was on the right of way of defendant by invitation; that he looked southward twice, while walking between the tracks, without discovering any danger; that he had no reason to expect that the engine and caboose which he saw moving south would be moved north; and that it should not have been moved back as rapidly as it was, without some one in charge of it. The conduct on the part of defendant, which plaintiff claims should be construed as an invitation to the public to use its right of way, or at least as permission to do so, was that it did not forbid the public from crossing the tracks at the south end of the depot platform, nor from walking along its tracks, and it frequently opened the trains on the different tracks so that pedestrians could cross them at the place in question.

It may be conceded that there was evidence which tended to show that the defendant gave to the inhabitants of Elma license to cross its tracks south of the depot platform, and even that it invited them to do so by separating its cars for the purpose of removing

obstructions to travel across the tracks; but there is no evidence to show that it invited people to walk along its tracks. The fact that it did not forbid their doing so cannot be given the force of an invitation. It may be there was evidence of such habitual use of the tracks by the public, which use was known to the employes of defendant, and not disapproved, that the jury would have been authorized to find that plaintiff had an implied license to use the right of way as he did. But, if that be true, defendant was under no obligation to protect plaintiff from harm by taking steps to prevent it, unless it had so acted as to mislead him. It was the duty of defendant not to injure him wantonly or wilfully, but if it had done no act to mislead, and had no reason to anticipate the danger to which plaintiff exposed himself, it owed him no active duty. *Splittorf v. State*, 108 N. Y. 213; 15 N. E. Rep. 322; *Sutton v. Railway Co.*, 66 N. Y. 246; *Nicholson v. Railway Co.*, 41 N. Y. 529; *Barstow v. Railway Co.*, 143 Mass. 535; 10 N. E. Rep. 255; *Sweeny v. Railway Co.*, 10 Allen, 372; *Gaynor v. Railway Co.*, 100 Mass. 214; *Wright v. Railway Co.*, 142 Mass. 299; 7 N. E. Rep. 866; *Hargraves v. Deacon*, 25 Mich. 1; Beach, Contrib. Neg. 55.

2. THE same.

II. It is said that plaintiff was injured at that point in the right of way which was used as a crossing by invitation of defendant, and, therefore, that it was required to use at least ordinary care to preserve him from injury. It is clear, however, that plaintiff was not injured in consequence of using the crossing on the invitation of defendant, but because he had walked along its track. Had he used the crossing in an ordinary manner, he could not have failed to see the approaching caboose in time to avoid the danger. He failed to discover and avoid the danger because he was using the right of way in a manner not authorized by anything more than a mere license. It is claimed that he was misled by the running of the engine an unnecessary distance south of Main street, and that he had no reason to expect that the caboose would

eventually be pushed northward. It does not appear that the management of the engine and caboose was unreasonable, or contrary to any custom of defendant, upon which plaintiff had a right to rely. It may be that it was wholly unnecessary for defendant to move the engine and car south of Main street, but it had a right to use its property in its own way, so long as it did not interfere with the rights of others, nor violate any duty in doing so. One who enters the yard of a railroad company under a mere license must be held to assume the risk of all dangers which are caused by a natural and proper use of the tracks and trains.

III. It is insisted by appellant that he was rightfully at the place where the accident occurred; that he used due care to avoid injury; and that defendant was guilty of such negligence as to make it liable for the injuries he received. If it be conceded that defendant was negligent, and violated a duty it owed to plaintiff, it does not follow that he should recover. He left his home just before the accident to visit the post-office. There was no occasion for him to go by way of the depot. After he reached the lead track, the most direct route for him to take was across both tracks to Busti avenue, and north on that until his destination was reached. No good reason for his failure to follow that route is given, and, by taking it, he would have avoided all danger. In going northward from Main street, he could have followed a line midway between the tracks, and have avoided danger from cars on either. He knew that the engine and caboose could go only about one thousand feet south of Main street before reaching the end of the lead track at its connection with the main line, and that they must stop within a few moments after passing him. The stock train moving south on the main line would necessarily suggest that fact to him. He could see everything on both tracks as far south as the end of the lead track. Under these circumstances, it was his duty to carefully observe the trains, especially that on the lead track, or to take such a course between the tracks

8. —: —: —: —: contributory negligence.

as to be beyond the reach of danger from passing cars; but he failed to do this. He looked back once, and saw that the engine and caboose were going south. He looked again, when within fifteen or twenty steps of the place where he was hurt, as he claims, and failed to see the approaching caboose. But, if he looked south along the lead track at that time, he could not have failed to see the caboose, which must then have been within about one hundred feet of him, and approaching rapidly. The noise made by the stock train running near him would prevent his hearing a train approaching on the lead track, and, for that reason, he was required to use greater diligence in avoiding danger from that direction. It is said that his attention was distracted by the signals given by the boy who tried to warn him of his danger, and, for that reason, he did not discover the approaching car. But the conclusion is irresistible that, had he exercised but a moderate degree of care, he would have discovered and avoided the danger. The fact that the signals of the boy were not comprehended is an indication that he entertained no thought of danger, and was not on the lookout for it. This court in *McAlister v. Burlington & N. W. Ry. Co.*, 64 Iowa, 398, approved the following declaration of the law: "It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risks of the perils he may encounter." See, also, *Masser v. Chicago, R. I. & P. Ry. Co.*, 68 Iowa, 604. There are, doubtless, exceptions to the rule thus expressed, as, for example, the case of a person who is on the track in the discharge of a duty. But, as a general rule, it is the duty of a person who voluntarily exposes himself on a railway track to danger from moving trains to be constantly on the alert to discover and avoid the danger. See *McAlister v. Burlington & N. W. Ry. Co., supra; Murphy v. Chicago, R. I. & P. Ry. Co.*, 45 Iowa, 664; *Carlin v. Chicago, R. I. & P. Ry. Co.*, 37 Iowa, 322; *Railway Co. v. Houston*, 95 U. S. 697; *Mahlen v. Lake Shore &*

M. S. Ry. Co., 49 Mich. 585; 14 N. W. Rep. 556; *Bresnahan v. Railway Co.*, 49 Mich. 410; 13 N. W. Rep. 797; Patterson Ry. Acc. Law, sec. 199. The undisputed facts in this case show that the injuries in controversy would not have been received had plaintiff exercised ordinary care to avoid danger.

The court, therefore, acted properly in taking the case from the jury, and its judgment is AFFIRMED.

GEORGE SWEESEY, Appellant, v. LYMAN SPARLING, Appellee.

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Public Lands: HOMESTEAD ENTRY: PRIOR AGREEMENT TO CONVEY. The plaintiff and defendant having occupied different portions of a tract of public land, and improved the same, went to the land-office together with a view to making homestead entries therefor, and then discovered that it was necessary that the whole of the land be entered by one person. It was thereupon agreed that the plaintiff enter the entire tract, and, upon acquiring title, convey to defendant the portion occupied by him. *Held*, that the agreement was valid.

Appeal from Monona District Court.—HON. C. H. LEWIS, Judge.

MONDAY, OCTOBER 27, 1890.

THIS action involves the title to a tract of land in Monona county. The plaintiff claims to be the owner of the property by virtue of a homestead entry made on the fifteenth day of November, 1887. The defendant, by an answer and cross-bill, claims that, although the land in controversy was entered as a homestead by plaintiff, yet that it was under an agreement between the parties that, if the defendant would not attempt to homestead the land occupied and claimed by him, and would permit the plaintiff to homestead all land claimed

by both, he (plaintiff) would convey to the defendant that part of the tract claimed by him when he (the plaintiff) procured title from the United States. There was a trial upon the merits, and a decree for defendant. The plaintiff appeals.

S. H. Cochran and *C. E. Underhill*, for appellant.

Pendleton Hubbard, for appellee.

ROTHROCK, C. J.—The land in controversy is situated an the east bank of the Missouri river. It appears from the evidence that the plaintiff homesteaded the whole tract on the fifteenth day of November, 1887. He took possession of the land in September, 1884, and made improvements thereon by building a house, stable, sheds and cribs, and fencing and clearing up the land. One John Kennedy afterwards made a claim on part of the land, and lived upon it. The plaintiff advised the defendant that Kennedy desired to sell his claim, and, at the instance of plaintiff, the defendant bought Kennedy's claim, and moved on the land. The plaintiff assisted him in moving. Sparling has been in possession since that time. He built a house, and made other improvements. The evidence is quite clear that the plaintiff recognized the right of the defendant to the part of the land occupied by him to be the same as the right of the plaintiff to that part of which he had possession. The *status* of affairs so remained until the time of the entry. Both of the parties went to the United States land-office at Des Moines to enter their land, when it was discovered that, under the statutes of the United States, all the land had to be homesteaded by one person, or in a different shape from the way in which the parties themselves occupied it. The defendant claims that, to avoid the difficulty, it was agreed that Sweesey should enter the whole tract, and that, as soon as he procured the title, he would convey that part now in controversy to the

defendant. The plaintiff denies that any such agreement was made. There is a conflict in the evidence on this question. We are satisfied that it is shown by a fair preponderance of the evidence that the agreement was made as claimed by defendant. There is a preponderance so far as the testimony of the witnesses is involved, and defendant and his witnesses are strongly corroborated by the fact that it is undisputed that the plaintiff procured the defendant to purchase whatever right Kennedy had, and recognized the right of defendant to be equal to his own until after it was homesteaded in his name.

The question to be determined is, can the defendant enforce the agreement made at Des Moines? Or is he precluded from setting it up and claiming under it by the statutes of the United States? It is claimed that the case is within the rule announced by this court in *Oaks v. Heaton*, 44 Iowa, 116, and that the agreement made at the land-office was absolutely null and void. The rule in that case, as stated in the head-note, is as follows: "O. had pre-empted a quarter section of government land, and had made valuable improvements thereon, when he agreed with H. that, if the latter would take possession and perfect a title under the homestead act, he would relinquish his rights already acquired, and should receive, in consideration therefor, a deed to half of the land, when the title should be perfected. Held, that the agreement was in violation of the provisions of the homestead act of the United States, and could not be enforced." The case at bar, however, is more nearly like *Snow v. Flannery*, 10 Iowa, 318. In that case as in this, the parties settled upon the land before a survey was made by the government, and their respective claims were designated by themselves by claim lines, and both parties had equal claims when they appeared at the land-office to homestead the land, and it was discovered that, under the pre-emption laws, the land could not be entered in parts, but must be entered as a whole; one of the parties must give

way or both abandon their claims. In both cases substantially the same agreement was made, and in the cited case the agreement was enforced. It is claimed, however, that *Snow's case* arose under the federal statute of 1841, while the entry in the case at bar was made under the homestead act of 1862. We have examined these statutes. The act of 1841 provided that "all assignments and transfers of the rights hereby secured prior to the issuing of the patent shall be null and void." It is true that the act of 1862 is more explicit in requiring the entry to be made for the exclusive use of the person in whose name the entry is made, but both acts provide that transfers or assignments made before the patent issues shall be void. In our opinion, the case at bar is, in substance, the same as the case last above cited. The facts are so nearly alike that the same rules of law should be held to apply. Counsel for appellee also cite us to the case of *Dawson v. Merrill*, 2 Neb. 119, but that case has been overruled in several subsequent cases. See *Simmons v. Yurann*, 11 Neb. 516; *Bateman v. Robinson*, 12 Neb. 511; *Blanchard v. Jamison*, 14 Neb. 246; and *Carkins v. Anderson*, 32 N. W. Rep. 155. The last-named case strongly supports the views we have herein expressed.

We think the decree of the district court is right, and it is AFFIRMED.

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ROSELLA YOCUM, Appellee, v. HENRY HASKINS, Appellant, AND JOHN VORE *et al.*, Appellees.

1. **Boundaries: PROCEEDINGS TO ESTABLISH: COMMISSIONER'S REPORT: APPEAL.** A proceeding to establish a disputed corner and boundary line under Laws, 1874, chapter 8, is a special proceeding wherein the commissioner's report has the force of the verdict of a jury, and is reviewable on appeal only on errors assigned.

2. ——: ——: EVIDENCE. Where, in such proceeding, the dispute is, as to which of two points is the established corner, and one point is where such corners are usually established, and is such as to give to each owner the quantity of land purchased, and the other is remote, and gives to some more and to others less than the quantity of land purchased, the former is to be regarded as the true corner, rather than the latter; and, following this rule, *held*, that the commissioner's report in this case is supported by a preponderance of the evidence.

3. ——: ——: ——: PRACTICE. Upon the filing of the commissioner's report herein with the district court, the plaintiff filed objections thereto and moved that judgment be rendered, fixing the corner at a point different from that found by the commissioner. This motion was sustained, and the court rendered judgment accordingly, dividing the costs equally between the parties joining in the contention. *Held*, that this action of the court, except as to costs, was erroneous; that the commissioner's report should have been approved, modified or amended, and judgment rendered accordingly, or the same rejected, and the report re-referred to the commissioner for correction, or the commission set aside, and a new commissioner appointed.

Appeal from Harrison District Court.—HON. SCOTT M. LADD, Judge.

MONDAY, OCTOBER 27, 1890.

PROCEEDING under chapter 8, Laws, 1874, to establish a disputed corner and boundary line of lands, with notice to Henry Haskins and Vore and M. Coleman. Haskins and Vore appeared, and Haskins alone appeals. The dispute is as to the location of the quarter-section corner in the north line of section 14, township 78, range 43, Harrison county, as established by government survey. Plaintiff contends that it is at a point twenty rods west of the center of said section line, and appellant Haskins contends that it is substantially at the center. By agreement of parties, C. W. Bisbee, a practical and experienced surveyor, was appointed commissioner. His report shows that, after hearing all the testimony offered and arguments of counsel, he made a careful survey of said section, as shown in a plat, and field-notes accompanying his return, and finds, "as there shown, the true position of the quarter corner

between sections 11 and 14, township 78, range 43, Harrison county, Iowa, to be about the geographical center thereof, as claimed by defendant in this cause, and designated in my plat herewith, returned with the letter 'B,' at which point I placed an oak post," etc. The point contended for by plaintiff is indicated on the plat as "A." Plaintiff filed her motion "to re-establish the quarter corner * * * at point A, as designated on the plat of the commissioner." She also filed objections to the report, questioning the correctness of the finding. Defendant Haskins also filed a motion to affirm and adopt the report. The court overruled defendant's motion, and sustained the objection of plaintiff to the report, and her motion to re-establish the quarter corner, and entered an order re-establishing it at the point claimed by the plaintiff. The defendant Haskins appeals.

L. R. Bolter & Sons, for appellant.

Joe H. Smith, for appellees.

GIVEN, J.—I. Question is made as to how this proceeding is to be tried in this court. It is a special proceeding triable as an ordinary action, and reviewable upon errors assigned. *In re Harrington*, 54 Iowa, 33. Appellant contends that it was tried as an equity case in the district court, and is, therefore, triable *de novo* on this appeal. The record does not show that it was so tried. The proceedings were as contemplated in the statute. The proceeding is before us for review upon the errors assigned. The principal errors assigned may be stated thus: That the court erred in not approving the report of the commissioner, and in establishing the corner as it was ordered to be established. Appellee contends that the findings of the court stand as the verdict of a jury, and cites the rule that, where there is a conflict of evidence, the finding and judgment of the trial court will be adhered to on appeal. *Walrod v. Flanigan*, 75 Iowa, 366, and other cases.

1. BOUNDARIES: proceedings to establish: commissioner's report: appeal.

Does the judgment of the court stand as the verdict of a jury in this special proceeding? A question of fact is to be determined, — the true location of a quarter corner. This is to be done, not by the court alone, nor by its commissioner, but by the combined action of both within the scope of their respective powers conferred by statute. The commissioner is to take the testimony of persons who may be able to identify any original government corner line, tree or other noted object, etc. He is to make a survey, and report his proceedings to the court accompanied by a plat and notes of his survey. By the testimony and survey the commissioner finds the corner, and reports the evidence and survey upon which he bases his finding. It is the finding of the commissioner, rather than the judgment of the court, that stands as the verdict of a jury. The court may approve, reject, modify or amend the report, or refer the same back for correction, in conformity with the judgment of the court, or, for good reasons, may set the commission aside and appoint a new one. These powers are not unlike those exercised by courts with respect to verdicts of juries. The reason for referring the issue of fact to one or more surveyors instead of to a court or jury is, that a determination of the question calls for the exercise of the learning and experience peculiar to surveyors. Regarding the finding of the commissioner as the verdict of a jury, and, applying the rule contended for by appellee, it should not be disturbed, "unless there is such a want of testimony to support it, as will raise a presumption that it is not the result of an unprejudiced and honest exercise of discretion. *Vogel v. Wadsworth*, 48 Iowa, 28; *Knox v. Hanlon*, 48 Iowa, 252; *Smith v. Walker*, 49 Iowa, 289. The rule that applies in reviewing the action of the trial court in granting and refusing new trials does not apply. A new trial was neither granted nor refused, but a judgment was entered the reverse of that called for by the report. We are of the opinion that, in reviewing the proceeding upon the errors assigned, we are to say whether the report has

such support in the testimony, as that the rulings and judgment of the court were erroneous.

II. The field-notes of the government survey, made December, 1857, recite "that the east random line between sections 11 and 14 was run at a variation of ten degrees and fifty minutes, intersecting meridian section line fifty links north of center. West, corrected between sections 11 and 14; variations, ten degrees and twenty-eight minutes. At eleven chains and seventy links, stream runs northwest, three links wide; solid banks and bottom; forty chains and five links, set quarter-section post. Witnessed, burr-oak, fifteen inches in diameter; south, twenty-nine degrees; west, seventy-two links; burr-oak, sixteen inches in diameter; north, fifty-five degrees; east, eighty links. At forty chains and ten links, linn, eight inches in diameter. At fifty-five chains, leaves timber; bears northwest. At fifty-eight chains, stream, two links wide, runs northwest. At sixty-two chains, stream, three links wide, runs northwest; high, solid banks; clay bottom. At eighty chains and ten links, set section corner. Settlement and field on northeast quarter of section fourteen, near center."

2. —: —; evidence.

Two burr-oaks bearing certain marks stand near the section line in substantially the position called for in the field-notes, twenty rods west of the center of said line. Appellee contends that these are the bearing trees called for in the field-notes, and should control in the location of the corner. A clump of linns formerly stood west of these oaks. There is decided conflict in the testimony as to the character of the marks, and the diameter of these trees, in 1851, as shown by their present diameter. Surveys having reference to this quarter corner were made in 1858, and 1859, by N. McKimmey, and in 1870 by George Madison. McKimmey found that the quarter post was placed twenty rods too far west by government surveyors, and at this point found burr-oak, fifteen inches in diameter; south, twenty-nine degrees; west, seventy-two links; burr-oak, sixteen inches in diameter; north,

fifty degrees; east, eighty-six links. Madison first located the corner at the center, and afterwards at the same point as McKimmey. The commissioner's measurements from the point, claimed by appellee to be the corner, to the two burr-oak trees, claimed to be bearing trees, correspond substantially with that called for by the original field-notes. His measurements also correspond with the original survey as to streams, as near as such measurements usually agree. His report shows that, at the point B, designated by him as "the corner," he found two burr-oak stumps, which his measurements show suit the calls of the original field-notes, except a difference of twenty-five links in the distance to the southwest stump. A. C. Snyder made a survey in 1887, for the purpose of locating this disputed corner. His measurements and statements, as to the stump, correspond with those of the commissioner. There are a number of witnesses who testify to the presence and condition of those stumps, and to a ditch and fence in line with that claimed by appellant. There is also testimony as to when these burr-oaks were cut down.

This is not a proceeding to correct errors in the government survey, but to ascertain what that survey was. The true corner is where the United States surveyors established it. It is a well-established rule that when boundaries are fixed and known, and unquestioned monuments exist, and neither courses, distances nor computed contents correspond with the monuments, the monuments govern. *Pernam v. Wead*, 6 Mass. 131; *Nelson v. Hall*, 1 McLean (U. S.) 518. When the boundary is not fixed and known, but is in dispute, courses, distances and contents may be considered in fixing and knowing the true boundary. When, as in this case, the dispute is as to which of two points is the established corner, and one point is where such corners are usually established, and such as to give to each owner the quantity of land purchased, and the other is remote, and gives to some more and to others less than the quantity of land purchased, it will surely require less evidence to convince the mind that the

former is the true line than that the latter is. We have extracted but briefly from the testimony, but a careful examination of the whole leads us to the conclusion that the finding of the commissioner is supported by a decided preponderance of all the evidence.

III. The authority of the court was to approve or reject the report, to modify, amend or re-refer the same for correction, or to set aside the commission, and appoint a new one. If approved as reported or as amended or corrected, judgment upon it would follow. If rejected, another report must be made by that or another commission before judgment. The court did not approve the report as made, nor make or require amendment or correction thereof, but entered judgment as if it was the reverse of what it was. While courts may set verdicts aside, they may not, without further proceedings, enter judgment as if the verdict had been the reverse. Our conclusion is that the district court erred in sustaining appellee's objections to the commissioner's report, and in establishing the disputed corner as shown in the final judgment. One-half the costs was taxed to appellee, and one-half to appellant Haskins. These were the only parties joining in the contention, and were properly charged with the expenses and costs.

s. —: —: —: practice.

It follows, from the foregoing discussion, that the judgment of the district court must be reversed. The case is remanded for further proceedings, in conformity with this opinion. REVERSED.

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E. N. COUGHRAN *et al.*, Appellees, v. R. B. GILMAN, Appellant.

1. **Action on Foreign Judgment: JURISDICTION: EVIDENCE.** Where a certificate to the judgment record of a foreign court indicates on its face that it is a court of record, and that it has a seal and a clerk, it will be presumed in an action thereon, until the contrary is shown, that the court rendering such judgment had jurisdiction of the parties, and of the subject of the action.

2. ——— : ASSIGNMENT : EVIDENCE. Where the assignment of a judgment has been made a part of the record of the court, a certified copy thereof is competent evidence in an action on the judgment in a foreign court, the same as other parts of the record.

Appeal from Hardin District Court.—HON. S. M. WEAVER, Judge.

MONDAY, OCTOBER 27, 1890.

THIS is an action at law, founded upon a judgment rendered against the defendant in the district court in and for Yankton county, Second Judicial District of Dakota territory. There was a trial by the court, and a judgment for plaintiffs. The defendant appeals.

F. Gilman, for appellant.

Albrook & Hardin, for appellees.

ROTHROCK, C. J.—I. The cause has once before been in this court. 72 Iowa, 570. On the former trial there was a judgment for the defendant. That judgment was reversed by this court. On the last trial there was a judgment for the plaintiff. We need not set out the record of the judgment of the district court in Dakota. It will be found set out in full in our former opinion. It is averred in the petition that the court in which the judgment was rendered was a court of general jurisdiction in the territory of Dakota. The answer contains a general denial of the averments of the petition. The plaintiff introduced the record of the judgment in evidence. This record is properly authenticated and proved by the certificates of the clerk with the seal of the court, and the certificate of the judge of said court.

1. ACTION on foreign judgment: jurisdiction: evidence.

It is contended by counsel for appellant, that the plaintiff failed to show that the district court of Dakota was a court of general original jurisdiction, or that it had jurisdiction of actions for divorce, and for the allowance of alimony in proceedings of divorce. We must

decline to enter into an elaborate discussion of these objections. It appears from the certificates to the judgment record, that the district court in Dakota was a court of record; that it had a seal and a clerk, and it will be presumed, until the contrary is shown, that it had jurisdiction of the parties and the subject of the action. The very fact that the defendant commenced his action for divorce in said court, and invoked its jurisdiction, tends at least to show that the court had jurisdiction of the action, and of the ordinary incidents thereto, such as orders and judgments for proper alimony. And, besides, courts may properly take judicial notice of the federal statutes creating courts in the territories, and defining their jurisdiction. 1 Greenl. Ev., sec. 490.

II. The plaintiffs are assignees of the judgment upon which the suit is founded. A copy of said assignment, certified by the clerk of the court in which the judgment was rendered, was introduced in evidence over the defendant's objection. It is claimed that the certified copy was not the best evidence. We think that, as the assignment was made part of the record of the court, a certified copy was competent evidence, the same as other parts of the record. It is enough to say in conclusion that the record of the Dakota judgment must be regarded as a verity in this action, and that whatever remedy, if any, the defendant ever had against the judgment was by proper proceedings in the court in which it was rendered or upon an appeal. AFFIRMED.

2. ——: assignment: evidence.

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CHARLES A. GRANNIS, Appellee, v. CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY, Appellant.

1. **Railroads**: DUTY TO EMPLOYES: NEGLIGENCE: PERSONAL INJURY. Where the car-coupler employed by a railroad company on one of its freight cars was one not commonly used, and was not reasonably safe when used with such cars, and one employed as a "wiper," having no previous knowledge that such coupler was in

use, nor of its dangerous character, while attempting to make a coupling with such car was injured, *held*, that the "wiper" had a right to believe that the cars and appliances used by the company were reasonably safe, and that the company was negligent in not informing him of the dangers of the service and of the methods of avoiding it.

2. ——: ——: CONTRIBUTORY NEGLIGENCE: SCOPE OF EMPLOYMENT. An employe of a railroad company who is employed as a man of all work about a roundhouse, and is required to assist in taking engines in and out of the roundhouse, and who has not been specially instructed as to his duties, is not to be held chargeable with negligence upon uncertain and nice distinctions as to the limits of his employment, when in good faith he performs a service outside the line of his duty.

3. ——: ——: EVIDENCE. Evidence of the belief, expectation or purpose of a coemploye in charge of the engine, with which said coupling was made, as to the action of the employe making the coupling, of which the latter had no knowledge, is not admissible in an action to recover for injuries sustained in such service.

4. ——: ——: APPEAL: PRACTICE. The supreme court cannot determine objections to the correctness of a model of machinery introduced in evidence on the trial in the district court to illustrate certain questions at issue, when such model is not before it.

5. ——: ——: ——: ——. The determination of the district court upon the question of the misbehavior of jurors on the trial of a cause cannot be reviewed on appeal when it appears that all the evidence upon that subject is not before the supreme court.

6. ——: ——; JURY: PRACTICE. Where a jury, upon coming into court with their general verdict, declared in open court that they could not answer a question submitted to them for their special finding, *held*, that the refusal of the court to require the jury to again retire, and return their statement as to said question in writing was not erroneous.

7. ——: ——: NEGLIGENCE: VERDICT. A verdict of five thousand dollars for the loss of a right hand by one employed as a "wiper" in the roundhouse of a railroad company is not excessive.

Appeal from Chickasaw District Court.—HON. L. E. FELLOWS, Judge.

MONDAY, OCTOBER 27, 1890.

ACTION to recover damages resulting from personal injuries received by plaintiff while an employe of defendant, and in the line of his duty, resulting from

defendant's negligence. There was a judgment on a verdict for plaintiff. The defendant appeals.

Fouke & Lyon and *Lusk & Bunn*, for appellant.

Springer & Clary, for appellee.

BECK, J.—I. The plaintiff was employed as a "wiper" in defendant's roundhouse at Elma. His duties were to clean engines "inside and out," assist in getting them in and out of the roundhouse, clean out cinder pits, load coal, and do general work. While assisting the "hostler," an employe whose duty it was to move engines when sent to the roundhouse, when assisting to take an engine to the cinder or ash pit preparatory to cleaning it, he attempted to couple it to a car standing in the ash-pit track, in order to remove it out of the way, and permit the engine to be taken to the ash pit. In attempting to make this coupling, his right wrist or arm was permanently injured, by being caught between the "goose-neck" of the tender, and the "dead-wood" of the car. These terms we understand designate the fixtures or parts of the respective cars which come in contact when coupling is done.

1. RAILROADS: duty to employes: negligence: personal injury.

II. Counsel for defendant insist, in more than one point and objection, that the verdict is without the support of the evidence, in that it fails to show negligence on the part of defendant. In our opinion there is evidence tending to prove that the coupling of cars when what is called a "stiff goose-neck" is used is more difficult and dangerous than if it were not used. It also appears that the act of coupling when a stiff goose-neck is used should be done by the use of an instrument called a "bar-coupler." The "goose-neck" was not commonly used with freight cars, and was not reasonably safe when used with such cars. The jury were authorized to find that plaintiff did not know before he attempted to make the coupling that the "goose-neck" was used, and had no information of the dangerous

character of a coupling when it is used; that he had never seen a coupling where it was used, and had not been instructed as to the dangers of the coupling, and how to make it when a "goose-neck" is used. Surely it was negligence on the part of defendant to require or permit plaintiff to perform the dangerous service of coupling when he was not apprised of its danger, and the method of avoiding it. He was authorized to believe that the cars and appliances used by defendant were reasonably safe, for the law requires it to use no other kind; and defendant was required to inform plaintiff of the dangers of the service, and the means of securing safety.

III. It is argued that the plaintiff was not in the line of his duty when the accident happened, and that he had voluntarily assumed, to couple the cars, without being required to do so by his duty or the command of a superior. There can be no dispute upon the law involved in this point; but the jury were authorized to find that he was in the line of his duty, performing services expected of him when he was employed. The evidence shows that the other "wipers," employes, charged with the same duty resting upon him, coupled cars to the engine when they were sent to the roundhouse, and such services were required. According to the testimony of defendant's own witnesses, plaintiff was a man of all work about the roundhouse, and was required to assist in taking engines into and bringing them out of the roundhouse. Other wipers coupled cars, though it appears he had not attempted to do so before. Surely the plaintiff was authorized to believe that his duty required him to couple the car. When an employe is charged with such various duties as was plaintiff, and is not especially instructed as to his duties, the law will not, upon uncertain and nice distinctions, hold him negligent, when in good faith he performs a service outside the line of his duty. *Ferguson v. Central Iowa Ry. Co.*, 58 Iowa, 293. The instructions given to the jury which are complained of by defendant accord with

2. —: —: contributory negligence: scope of employment.

these views; those refused do not. We think the court ruled rightly upon the giving and refusing of instructions.

IV. The employe who had charge of the engine when the accident happened was asked a number of questions as to his expectation, belief and purpose that defendant would or should make the coupling. Objections thereto were rightfully sustained. The belief, expectation or purpose of the witness, unknown to the plaintiff, was not a matter which could affect his rights.

3. —: —: evidence.

V. Defendant complains because a model was brought before the jury which it is claimed is not correct. It is impossible for us to say that it was not correct, or sufficiently correct to illustrate the description of the parts of the car represented by the model.

4. —: —: appeal: practice.

VI. Misbehavior of jurors while examining the "goose-neck" couplers while the trial was in progress is complained of by counsel. Without holding that the act was such misbehavior as would affect the verdict, we cannot regard the charge as established, for the reason that it does not appear that we have before us all the evidence introduced in the court below on the subject.

5. THE same.

VII. The jury failed to answer a question. When the verdict came in, the defendant asked that the jury be sent out to answer this question. The jury in open court declared they could not answer it. The court rightly regarded this as a sufficient declaration of the jury's want of ability to answer the question, and refused to do the vain thing of requiring the jury to retire, and return with a written statement to the effect of the one they had made orally in court.

6. —: —: jury: practice.

VIII. The verdict is for five thousand dollars. The jury were authorized to find that the injury deprived plaintiff of the use of his right hand. Considering his age, ability to earn money before he was injured, and other matters,

7. —: —: negligence: verdict

we think the verdict is not excessive, as claimed by defendant's counsel.

These considerations dispose of all objections to the judgment urged upon our attention. AFFIRMED.

JOHN A. CHURCHILL, Appellee, v. GRONEWIG & SCHOENTGEN, Appellants.

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1 **Landlord and Tenant: LEASE: CANCELLATION: EVIDENCE.** The agreement of a landlord to release a tenant from further obligation under a lease of premises, provided another tenant can be secured therefor, and his agreement to see a person named whom the tenant claimed would rent the same, will not operate as a release of the lessee from his obligation under said lease if another tenant is not in fact secured upon terms agreeable to the lessor.

2. ———: ———: ———: **INSTRUCTIONS TO JURY.** When the instructions of a court to the jury correctly present the propositions of law applicable to the questions at issue, a party who has not asked that the jury be more fully instructed cannot complain upon appeal that more elaborate instructions were not given.

3. ———: ———: ———: ———. The defendants pleaded an estoppel to plaintiff's claim for rent based upon an agreement alleged to have been made prior to their vacation of the leased premises, and introduced evidence of statements made by plaintiff on the basis of such agreement, and tending to prove an estoppel. *Held*, that as the jury must have found that the alleged agreement was not in fact made, an instruction withdrawing the issue of an estoppel from the jury was not erroneous.

Appeal from Pottawattamie District Court.—HON. H. E. DEEMER, Judge.

MONDAY, OCTOBER 27, 1890.

IN December, 1879, John Beno and these defendants entered into a contract, whereby the former leased to the latter certain premises for the term commencing November 1, 1879, and ending November 1, 1886, at the agreed rental of one hundred and eight dollars and sixty-six cents per month. On the fifth of October,

1883, Beno assigned the lease to Sallie A. McMahon, who, on the tenth of March, 1885, assigned it to George F. Wright, and on the twenty-seventh of October, 1885, he assigned it to plaintiff. Plaintiff brought suit to recover rent for the months of February, March, April, May, June, July, August, September and October, 1886. Defendants answered: *First.* That by a parol agreement entered into prior to October, 1885, between them and Wright and McMahon, the lease was canceled, and that they had surrendered possession of the premises under such agreement; and, *second*, that after the lease was assigned to plaintiff he was advised by defendants of such agreement to cancel the lease and surrender the premises, and that he assented thereto, and agreed that he would claim nothing from them under the lease, and that, relying on that promise, they had vacated the property and removed their business to other premises, which they rented in reliance thereon, and that he thereby waived all claim under the same. These issues were tried to a jury, who found for plaintiff, and the court entered judgment on the verdict, from which defendants appeal.

Wright, Baldwin & Haldane, for appellants.

Burke & Hewett, for appellee.

GRANGER, J.—I. Appellants urge that the undisputed evidence shows that there was such an agreement made between defendants and Wright and Mrs. McMahon, as to release defendants from further obligations for rent. In this respect appellants are certainly in error, and the error arises from unwarranted conclusions from some statements in the testimony. At the time the release was sought, Mr. Wright was the owner of the lease, and he declined to release defendants except with the consent of Mrs. McMahon, and he was to, and did, see her, and she agreed to release defendants *provided another tenant was obtained in their stead.* No tenant

1. LANDLORD and tenant: lease: cancellation: evidence.

was ever obtained. It is then urged that, because of certain statements by Mr. Wright and by Jesse McMahon, as agent for his mother, the defendants were absolutely released. Appellants say, as to the release, that Mr. Wright saw Jesse, and he (Jesse) agreed that defendant could vacate the property, and he would find a tenant, and that Wright told defendants of the agreement, and that he was released. It is the testimony of Mr. Wright that is relied on in this respect, and we quote it below. Mrs. McMahon had agreed to release defendants if they (defendants) would procure other tenants on like terms, as she would not make repairs which defendants thought necessary. Mr. Wright informed defendants of this, and Mr. Schoentgen informed Mr. Wright that Cooper & McGee might be secured as renters, and desired him to see them. He declined, but agreed to see Jesse, and have him attend to it. And the witness says: "I went up to Jesse's office and told him Schoentgen had come in, and claimed that Cooper & McGee would take this building, and rent it for a term of years, and I said: 'Now, Jesse, do you want me to look after this, or will you look after it yourself?' He says: 'I will attend to it myself.' 'Very well,' I says, 'I won't do anything more about it.' 'No,' he says, 'you need not. I have got the time, and I will go and see Mr. Cooper about it.' I saw him. I think this was in the morning, and the same day, or the next morning, I saw him, and he said that he had been around to see Cooper, but didn't see him, but would see him right away. I said: 'Jesse, now you should attend to this, for it is important that you get this tenant.' He said he would do so. Very soon after Mr. Schoentgen came back, and, he says, wanted to know what had been done, and I told him just the conversation I had had with Jesse, and I says to him: 'Of course, I have not anything further to do with it than I have done,' and he said he would attend to it and see them; and he says. 'Well, then, I need not do anything more about it. He says, that would

release us.' And I made some remark that it looked that way, or something of that kind, and that ended the conversation."

Appellants urge that from the testimony they could properly understand that they were released. To our minds, no such conclusion is properly deducible. There is nothing in the testimony indicating that Jesse McMahon agreed to do more than see Cooper & McGee and secure them as renters if he could. Mr. Wright says he told Schoentgen just the conversation he had with Jesse. Schoentgen says: "That would release us." What would release them? Evidently, if Jesse secured Cooper & McGee as renters. There had been no talk of a release except renters were secured, and Wright was asking Jesse to do what Schoentgen wanted Wright to do,—see Cooper & McGee,—not to engage positively to secure them. The appellants say that Schoentgen testified that Wright agreed positively that the lease should be terminated. That he so testified is true, but in that he is contradicted, and in such a case we are to take that view of the evidence that will sustain the verdict. But, more than this, appellants well knew, when Wright told Schoentgen of what Jesse said, that Cooper & McGee would not accept the building without repairs, and also knew that they would not be released on such conditions. Cooper had told appellants their terms, and, at that time, appellants were the only parties knowing them. We think the verdict of the jury is fully sustained by the evidence.

II. Complaint is made as to the instructions 3, 4 and 5 given by the court. Appellants concede them to be correct as abstract propositions, but the claim is that they are not applicable "to the theory that plaintiff's claim was established by the proof." The instructions were pertinent to the issues, and called the attention of the jury to the facts sought to be established by the evidence; and correctly state the law as applicable to the facts when found. The complaint is that, by the instructions, to entitle defendants to a verdict, they must prove an

2. ——: ——. ——: instructions to jury.

absolute consent by Mr. Wright to the release, and that, as we understand it, the jury could not infer it from his conduct and statements. Nothing in the instructions in any manner indicated to the jury that the conduct and statements could not be considered in finding the real understanding of the parties as to the release, and, if appellants desired a more elaborate rule, it should have been asked. *Deere v. Wolfe*, 77 Iowa, 115. See, especially, *Gwinn v. Crawford*, 42 Iowa, 63.

III. The second division of the answer is in part a plea of estoppel, and the court, as applicable thereto,

8. THE SAME.

gave the following: "8. There is not sufficient evidence to support the defendants' plea of estoppel in this case, and you need give it no further consideration; but should you find under the rules above given you that, after plaintiff received an assignment of the lease in question, the defendants surrendered the premises to him; that plaintiff accepted the same, and released defendants from the payment of rent, after January 1, 1886, then plaintiff cannot recover." Appellants urge that there is testimony on which the question should have been submitted, and refer to the testimony of the defendants. It will be noticed that the defense rests upon a transaction between the plaintiff after assignment to him and defendants. The testimony relied upon is that the plaintiff came with the lease for his rent, and the defendants told him they had been "released by Mr. Wright" from the contract, and the plaintiff said: "Oh, well, that don't make much difference. That's all right, but I can, for what I have got in the lease, soon find a tenant that will take it until I get my money out of it." The jury under other instructions must have found that there was no release by Mr. Wright, and, hence, there could have been no finding for defendants on that issue if it had been submitted. If there was a release to serve as a basis for the estoppel or waiver, it must serve as a basis for a recovery under the other division of the answer; for, under that division, it was only necessary for defendants to show the

release to entitle them to a verdict. No prejudice could have resulted from withdrawing the question from the jury.

Complaint is also made as to the remainder of the same instruction on the ground that, in effect, it required the defendants to prove an agreement with plaintiff for their release, and it is said in argument that they did not plead a contract. But let us test the question by quoting from appellants' argument: "Defendants did not plead a contract for the termination of the lease with plaintiff. What they did plead was that plaintiff was informed of the contract with Wright and McMahon for its cancellation, and that he assented to it, and promised that he would make no claim for rent after the termination of the lease, as provided in that agreement, and that they relied upon that promise when they surrendered possession; and their proof was directed to that claim." With appellants' statement as to what they pleaded, is there less than a contract set forth? Plaintiff, being informed of certain facts constituting an agreement of Wright with Mrs. McMahon to release defendants, assented to it, and promised that he would make no claim for rent. And defendants relied upon the promise and surrendered possession of the premises. Plaintiff has assented to a former contract of release, and promised not to do a particular thing; and defendants seek the enforcement of the promise. We think that is pleading a contract. A contract is an agreement between parties for the doing or not doing of some particular thing. 1 Pars. on Cont. 6. The district court seems to have taken that view in its instructions, and its judgment should be AFFIRMED.

J. A. BROWN, Appellee, v. HORACE POOL, Appellant.

1. **Tax Sales: NOTICE TO REDEEM: WHEN UNNECESSARY.** Under Code, section 894, a notice to redeem is not required, when there is no person in possession of the premises sold, and the same are not taxed to anyone by name on the tax books.

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81 456
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2. ——: ——: **WHAT CONSTITUTES POSSESSION.** For some time preceding the date on which service of notice of the expiration of the time for redemption must have been served, the defendant had a corral on the southeast quarter of the section wherein the land in question is situated, and, without the assertion of any claim or right to do so, herded five hundred head of cattle belonging to himself and others over a range of open and uncultivated land extending from one to two miles from the corral, and including the land in controversy. *Held*, that defendant's possession was not such as entitled him to notice under the above statute.

3. ——: ——. Notice of the expiration of the time for redemption from a tax sale need not be served upon the purchaser at such sale because the property sold appears on the tax lists as having been assessed in his name.

Appeal from O'Brien District Court.—HON. C. H. LEWIS, Judge.

MONDAY, OCTOBER 27, 1890.

PLAINTIFF claims title under different tax deeds to the south half of the southwest quarter of section 12, and the northwest quarter of section 13, township 97, range 39, O'Brien county, and asks to be quieted in his title thereto. Upon the hearing plaintiff's petition was dismissed as to the first-described tract, and a decree entered in his favor as to the second. The defendant alone appeals, and hence the case is before us only in so far as it relates to the northwest quarter of section 13.

Hughes & Hastings, for appellant.

T. M. Stuart and *J. L. E. Peck*, for appellee.

GIVEN, J.—I. Plaintiff claims title under a tax deed from the treasurer of O'Brien county to him, executed January 13, 1886, for the lands in question, based upon a sale held on the fourth day of October, 1880, for the taxes of 1876 to 1879, inclusive, and upon notice of the expiration of the time for redemption, served upon G. W. Pitts, James D. Wright and L. F. Maple, more than ninety days before the execution of the deed. Appellant contends that the deed was invalid because the notice was not served upon the person in possession, nor upon the person in whose name the land was taxed. Appellee contends that no notice was required, and, if required, that it was served upon the proper parties. Section 894 of the Code requires that, after the expiration of two years and nine months after the date of sale, notice may be served upon the person in possession, and also upon the person in whose name the land is taxed, if such person resides in the county where the land is situated. It follows that if there is no person in possession of the land, and it is not taxed in the name of any person, no notice is required.

1. TAX sales: notice to redeem: when unnecessary.

II. The two years and nine months expired July 4, 1883. It appears that, during the summer of 1883, one Webster resided in the vicinity of the land, had a corral on the southeast quarter of said section 13, and in person, or by his hired man, without asserting any claim of right so to do, herded five hundred head of cattle belonging to himself and others over a range of open and uncultivated land extending from one to two miles from the corral, the land in question being included in the range. It is contended that Webster was in possession of the land in question, and that notice should have been served upon him. Where one is in fact in possession, notice must be served upon him without regard to whether he be rightfully in possession or not, but, in determining whether a party is in possession, we may inquire whether he makes any claim to possession. Webster's

2. ——: ——: what constitutes possession.

use of the land was not made with reference to boundary lines, and was in no sense a possession different from what he had of any other open land upon which his cattle ranged. These facts are different from any of the Iowa cases cited by counsel for appellant. In *Ellsworth v. Low*, 62 Iowa, 178, the owner was held to be in possession because he had used the land for taking timber and wood therefrom. In *Sapp v. Walker*, 66 Iowa, 497, the owner had authorized the removal of dirt from his vacant lot, and had cut the weeds from year to year, wherefore he was held to be in possession. In *Whities v. Farsons*, 73 Iowa, 137, R. had surrendered possession under his lease to plaintiff before service of notice. A portion of plaintiff's corn remained on the land, and anything belonging to R. that remained was with plaintiff's consent. It was held that plaintiff was in possession. In *Callanan v. Raymond*, 75 Iowa, 307. B. had a crop of corn growing on a small portion of the land, the balance being unimproved. It was held that B. was in possession.

III. It appears that the land was assessed in the name of I. P. Sams upon the assessment book of 1877.

3. —:—. Appellant contends that the presumption is that the land continued to be taxed in the name of Sams, and notice was, therefore, necessary to him. That presumption, however, is overcome by the evidence, which shows that Sams conveyed the land to James D. Wright, upon whom notice was served six years prior to the time of serving notice. The testimony of the treasurer and auditor shows that the tax lists for 1882 and 1883 were blank, with a very few exceptions, as to the names of owners in the column so headed, and that the treasurer entered names in that column at the time taxes were paid to him. The name J. A. Brown appears in that column in the list for 1882 and 1883, and was evidently put there after the tax list passed into the hands of the treasurer, as the auditor testifies that he had no clerk, and that the name was not written by him. If the tax list fails to show in whose name the land was taxed at the time for giving notice, and no one in was

possession, no notice was required. It fairly appears that J. A. Brown, whose name appeared on the tax list, is the same J. A. Brown who purchased at the tax sale, and who brings this action. That being the case, it is not required that Brown should serve notice upon himself. See *Knight v. Campbell*, 76 Iowa, 730.

This discussion leads us to the conclusion that the decree of the district court should be AFFIRMED.

S. A. PARKER, Appellant, v. FARMERS' LOAN & TRUST COMPANY *et al.*, Appellees.

Mortgage of Personal Property: TRUST DEED: RIGHT OF POSSESSION. A written instrument whereby a mortgagor surrenders the possession of all his interest in specific personal property to a person named, giving him power to lease or sell the same, and apply the proceeds to certain indebtedness, will not entitle such person to the possession of said property, as against one claiming under a prior mortgage upon the same property.

Appeal from Pocahontas District Court.—HON. LOT THOMAS, Judge.

MONDAY, OCTOBER 27, 1890.

ACTION of replevin. A demurrer to plaintiff's petition was sustained, and, standing on his pleading, he appeals.

I. W. Bane and *Goldsmith & Hart*, for appellant.

James Dougherty and *Wm. Milchrist*, for appellees.

BECK, J.—The plaintiff alleges in his petition that he is the unqualified owner, and entitled to the present possession, of certain cattle, sufficiently described in the petition; that he acquired the ownership of the cattle by a written pledge to secure the payment of

seven hundred and ten dollars, and that he took possession of the property under such writing and the oral assent of the owners. The writing is set out as an exhibit, and is made a part of the petition. It is alleged in the petition that defendants claim the property, and detain it, on the ground that the owners of the property executed four chattel mortgages, one to each of the respective defendants, which cover the property in controversy. Copies of these mortgages are made exhibits to the petition. It is alleged by plaintiff that his lien or claim on the property is prior and paramount to defendants' mortgages, for the reason the property is not sufficiently described to impart notice of the conveyances intended to be made by the instruments. The chattel mortgages were executed and filed for record before the paper upon which plaintiff bases his claim was made. This paper is, in fact, a lease of certain lands to plaintiff from the owners of the property in controversy, containing a declaration to the effect that they "put plaintiff in full possession of all their interest in the cattle, and the increase," with power to lease or sell them, and apply the proceeds upon certain notes held by plaintiff.

II. The instrument is neither a mortgage, nor does it witness an absolute sale. It simply surrenders the possession of the interest of the owners and creates an agency with power of sale. The interest held by the owners was that of mortgagors. Of course the mortgage, if valid, would hold the property, and, as there is nothing in the instrument under which plaintiff claims, showing a purpose to defeat the mortgages, their rights were in no way affected by it. The plaintiff insists that the mortgages are void because of insufficient description of the property covered. One of the mortgages, it cannot be claimed, is subject to this objection: It covers all the property of the mortgagor, which is sufficiently identified by statements as to the locality in which it may be found. It is sufficient to authorize defendant to take and hold the property as against

plaintiff. We need not inquire as to the effect of the other mortgages.

We reach the conclusion that the court below, by sustaining the demurrer, rightly held that the petition shows no right of plaintiff to hold the property as against defendants. AFFIRMED.

PETER BLASSER, Appellee, v. J. C. MOATS *et al.*, Appellants.

1. **Conveyance of Real Estate:** APPEAL: RECORD. The supreme court will not consider a motion filed in that court when there is no proof of service thereof of record.

2. ——— : RELEASE OF DOWER: AGREEMENT: EVIDENCE. In an action to foreclose a mortgage on real property for the collection of one-sixth of the purchase price thereof, the defendant claimed that he held a deed of the plaintiff's interest in the land only, and that at the time of the purchase the plaintiff agreed to make the title complete by obtaining his wife's signature thereto. The defendant's testimony was corroborated by two witnesses who were present at the exchange of papers. The plaintiff's denial of such agreement was unsupported by direct evidence, except that one witness, who was present when the terms of sale were talked over, testified that nothing was then said about the wife, but it appeared that prior to the sale the plaintiff and his wife had separated, and a suit between them was then pending for a divorce, in which the defendant was attorney for plaintiff, and had advised plaintiff, prior to the execution of the deed in controversy, to obtain a conveyance to these lands from his wife, which he did, and, after the deed to defendant, delivered the same to said defendant at his request. *Held*, that the claim of defendant was supported by the evidence, and that plaintiff's petition should be dismissed.

Appeal from Wright District Court.—HON. J. L. STEVENS, Judge.

TUESDAY, OCTOBER 28, 1890.

ON the second of October, 1882, the plaintiffs executed to defendant, A. J. Moats, a warranty deed for eighty acres of land in Wright county, for a consideration of twelve hundred dollars, which consideration has

been paid except one note for two hundred dollars, on which the plaintiff brings this action, and asks the foreclosure of a mortgage given to secure it on the premises sold. The defense is that the wife of the plaintiff did not join in the deed of the premises to defendant Moats, and that, at the time of the execution of the deed and the mortgage to secure the note the plaintiff agreed to procure his wife's signature to that or another deed to the defendant, which he has failed to do, and that the dower interest of the wife has not been relinquished. The agreement to procure a relinquishment of the dower interest is denied by the plaintiff. The district court gave judgment for the plaintiff, and the defendants appeal.

Moats & Moats and *Nagle & Birdsall*, for appellants.

Aaron Yearons, for appellee.

GRANGER, J.—I. Appellee files a motion asking us to strike out a part of appellants' abstract, but there is no proof of service of the motion, as required by rule number 52, of this court, and the motion must be disregarded.

1. CONVEYANCE of real estate: appeal: record.

II. The controlling question in the case is, did the plaintiff, at the time of making the deed, agree to procure the signature of his wife to the deed, or procure the conveyance of her dower interest to the defendant? To our minds the solution of the question from the evidence is not difficult. The plaintiff's evidence in support of such an agreement is that of J. C. Moats, who says that, at the time of the conveyance, the plaintiff did agree to obtain such a conveyance from his wife, and that he afterwards took the deed to obtain her signature to it. The justice who took the acknowledgment of the deed is a witness for defendants, and says: "The question of the wife's not joining in the deed was talked over, and Peter Blasser said he would make that

2. ——: release of dower: agreement: evidence.

all right by getting her to sign it." The same witness also says he was in the office of Moats & Moats when Blasser was present, and one Boyd asked Moats if the notes he had given Blasser were all right. "Mr. Moats replied that the notes were all right if Mr. Blasser made the title to the land all right, as he agreed. Mr. Blasser replied that he would make that all right." This evidence is met by a denial by the plaintiff that he made such an agreement, and stands unsupported except by one witness (Derscheid) who says he was present at the sale. By that he does not mean that he was present at the making of the papers, but at his home when the parties talked over the terms of the trade, and nothing was then said about the wife. Derscheid does not pretend to contradict Moats, and the justice as to what was said when the papers were made out, for he was not there. The record shows two witnesses against the one as to what was said about the wife's relinquishment being obtained. Plaintiff does not dispute that he took the deed to get his wife's signature to it after he had made it. It appears that the plaintiff and his wife were not living together, and that there had been a divorce proceeding instituted against her, and that the defendants in this suit were attorneys for the plaintiff in that, and knew the plaintiff and his wife were not living together at the time of the conveyance. It also appears that J. C. Moats, at some time before this conveyance was completed, advised plaintiff to get from his wife a conveyance of her interest in the lands, and, some time after the deed was made to the defendant Moats, he asked plaintiff for that deed, and plaintiff gave it to him. Some importance is attached to this transaction by appellee. It is, however, to be kept in mind that the taking of this deed as a conveyance of the wife's interest was not thought of at the time of the sale of the land to the defendants. The existence of the deed was then known to both parties, and, some time afterwards, Moats asked for it, and received it. The incident serves somewhat to show that the land was not purchased

regardless of the interest of the wife; and plaintiff nowhere pretends that a word was ever spoken to the effect that less than a perfect title was to be conveyed. The plaintiff is an illiterate German, and did not understand our language perfectly, and was ignorant of the law governing the transfer of lands, and it may be assumed that he believed that, by his deed from the wife, he obtained a release of her contingent interest, and there is some reason for thinking that, when the transfer was advised, our statutory provision on that subject was not in mind, and, but for the strong corroboration of the defendant as to the agreement when the deed was made, we might readily understand that the plaintiff's deed was accepted, relying on a mistaken view of the law as to the rights of the wife. What would be the rights of the defendant if the deed was accepted with such a mistaken view, we need not discuss. That both plaintiff and defendants expected that the title of the defendants would be a good one, is not open to question from the claims of either party. That the title is not a good one, is absolutely certain. This fact as to the purpose of the parties, and the real condition of the title, with the preponderance of evidence as to the agreement, makes it our duty to reverse the action of the district court, and direct that the plaintiff's petition be dismissed. REVERSED.

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OMAHA & ST. LOUIS RAILWAY COMPANY, Appellee, v. JAMES O'NEILL, Sheriff, *et al.*, Appellants.

1. **Change of Venue:** APPLICATION BY NOMINAL PARTY. A defendant who is only a nominal party to a cause cannot compel a change in the place of trial without the concurrence of his codefendant who is the real party in interest, and who has filed an answer to plaintiff's petition prior to the application for a ransfer of the cause.

2. **Mortgage: FORECLOSURE: DECREE: EFFECT.** Where in a suit for the foreclosure of a mortgage an issue is presented involving the rights of all parties having or claiming any interest in the property claimed under the mortgage, the determination of such issue by a court of competent jurisdiction is conclusive upon one who was then a mere general creditor of the mortgagor.

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

TUESDAY, OCTOBER 28, 1890.

THIS is an action in equity for an injunction to restrain the defendant O'Neill, who is sheriff of Pottawattamie county, from selling, at sheriff's sale, certain real estate and certain shares in a corporation, upon an execution issued upon a judgment rendered in Des Moines county district court, in an action in which one B. R. Westfall was plaintiff, and the Wabash, St. Louis & Pacific Railway Company was defendant. Said judgment is now the property of the defendants, Polk & Hubbell. The ground upon which the plaintiff seeks the injunction is that the property levied upon is not the property of the defendant in execution, but that it is the property of the plaintiff. A preliminary injunction was issued as prayed, which, upon final hearing, was made perpetual. The defendants appeal.

H. S. Priest and *F. T. Hughes*, for appellants.

Theo. Sheldon, for appellee.

ROTHROCK, C. J.—I. The first question arising upon the record is whether the court should have changed the place of trial to Pottawattamie county, in pursuance of a motion made by the defendant O'Neill. Counsel for appellants insist that the court erred in overruling the motion. Thomas O'Neill, the sheriff, is a resident of Pottawattamie county. The defendants, Polk & Hubbell, are residents of Polk county, and the

1. CHANGE of venue: application by nominal party.

judgment was rendered in, and the execution issued from, Des Moines county. The petition for an injunction was filed on the fifth day of March, 1888, and, on the tenth day of the same month, Polk & Hubbell filed their answer. On the thirtieth day of the same month, the defendant O'Neill filed a motion for a change of the place of trial. The defendants, Polk & Hubbell, did not join in this motion. O'Neill did not, at any time, file an answer in the case, and, on the final decree, he was adjudged to be in default for want of an answer. It is provided by section 2589 of the Code that, "if a suit be brought in the wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county." It is not pretended that O'Neill has any personal interest in the action. For the purposes of this case, he is a mere ministerial officer of the law, in a state of inaction, pending the litigation between the plaintiff and the defendants, Polk & Hubbell, the real parties defendant. Polk & Hubbell filed the only answer that was filed before the motion for change of venue was made. The motion came too late to be of benefit to them, and the statute does not contemplate that a merely nominal party, without the concurrence of the real parties, may compel a transfer. The real question at issue was tried in the district court of Des Moines county by the real parties in interest, without objection, and this court is not called upon to determine for them whether it was tried in the proper county.

II. We come now to a consideration of the merits of the case. It involves but one ultimate question, which is, whether the property levied upon is owned by the plaintiff, the Omaha & St. Louis Railway Company. The said plaintiff claims to be the owner, through the foreclosure of a mortgage dated February 15, 1879, a foreclosure sale thereunder, and a master's deed of the date of March 29, 1887, and a supplementary decree dated

2. MORTGAGE: foreclosure: decree: effect.

October 7, 1887. The defendants claim under a judgment recovered December 30, 1885, in the circuit court of Des Moines county, an execution issued from that court dated November 21, 1887, and a transcript of said judgment filed in Pottawattamie county, November 23, 1887, and a levy made December 1 in the same year. The property in dispute is situated in Pottawattamie county. It will be conceded for the purposes of this case that, if the transcript of the judgment had been filed in Pottawattamie county before the said foreclosure suit was commenced, the judgment would have been a lien upon the property. This concession is made to avoid a voluminous statement of the contents of certain deeds, mortgages, decrees of foreclosure and other documents set out in the record. They are all immaterial to the vital question in the case. The mortgage under a foreclosure of which the plaintiff claims the property in controversy describes the property mortgaged in these words: "All and every part and parcel of the continuous line of railroad aforesaid, and all right, title and interest therein, as now owned, leased and held by the said St. Louis, Kansas City & Northern Railway Company, commencing at said Elm Flats, near Pattonsburg in the state of Missouri, and extending through the counties of Daviess, Gentry, Nodaway and Atchison, in said state of Missouri, and through the counties of Page, Fremont, Mills and Pottawattamie, in the state of Iowa, to the city of Council Bluffs, in said state, as said railroad now is, or may be hereafter, constructed, maintained, operated or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, sidetracks, water-tanks, engines, cars and other appurtenances thereunto belonging." If this description includes the property levied upon in this case, the decree of the district court is correct, becauses it is not claimed that the proceedings in the foreclosure suit were not in all respects regular. The property levied upon by O'Neill, sheriff, as shown by his return, is as follows: "About three acres of ground situated in

northwest quarter of section 2, and in southwest quarter of southwest quarter of section 35, township 74, range 44, now occupied by the buildings and grounds of the Union Elevator Company of Council Bluffs, Iowa; also, the following personal property: All the stock and shares of stock, consisting of four hundred and sixty-seven shares, more or less, of the nominal value of one hundred dollars per share, in the certain corporation known as the 'Union Elevator Company,' of Council Bluffs, Iowa, and all the interest of the said Wabash, St. Louis & Pacific Railway Company in said corporation, and the assets thereof."

It should have been stated that the action for the foreclosure of the mortgage was in the circuit court of the United States for the southern district of Iowa. The question was submitted to the court in the action for foreclosure, whether the above-described Union Elevator property and the shares of stock were included in the said mortgage, and it was held that it was so included, and that it was part of the mortgaged property. That question was not one presented to that court merely to settle the claims made by the receivers appointed by the federal courts in Missouri and Iowa. So far as appears, all parties having any interest in the railroad mortgaged and its appurtenances were parties to that action. Counsel for defendants makes some claim to the effect that, by a strict foreclosure of a mortgage, nothing is subject to the mortgage, except the property described, and that, in such a proceeding, no such orders are made as was entered by the federal court. But this was not a strict foreclosure. The action involved all of the rights of all of the parties to all the property embraced in the mortgage, and it was a question for the federal court to construe the mortgage, and determine just what property was mortgaged. The defendants have no right to complain of the decision of the federal court. At that time, they had no lien against the Wabash, St. Louis & Pacific Railroad Company upon any property outside of Des Moines county. It is possible that they might have presented a case

entitling them to relief, upon the ground that the Wabash Company and the plaintiff herein, by fraud and collusion, obtained a decree including property that was not mortgaged. But no such claim is made. The defendants were mere general creditors without liens, and they have no right to question the construction placed upon the mortgage by the federal court. It is claimed that an appeal was taken from said order to the supreme court of the United States, and that the appeal is still pending. But it appears that the order was not suspended by bond, and, unless so suspended, the order remains in full force. *Kourtze v. Omaha Hotel Co.*, 107 U. S. 378; 2 Sup. Ct. Rep. 911. It is claimed further that an action in equity cannot be maintained, because the property involved in the action is personal property, in the nature of choses in action. But the return of the sheriff shows that he made a levy upon real estate; and the order made by the federal court includes the shares of stock as incident to the elevator property. We have not thought it necessary to refer to the numerous authorities cited by counsel. We have preferred to determine the cause upon well-established fundamental principles. We cannot follow counsel into the examination of authorities upon the rights of lienholders. These defendants were not lienholders at any time. When they filed their transcript of the judgment in Pottawattamie county, the judgment defendant had no interest in this elevator property, nor in the shares of stock in the corporation.

The decree will be AFFIRMED.

D. M. DOUGLASS, Appellee, v. JOHN HANNAH *et al.*, Appellants.

Conveyance in Fraud of Creditors: NEGOTIABLE PAPER: NOTICE. A conveyance of real estate by an insolvent debtor to one of his sons in consideration of his promissory note for the purchase price, which note is transferred by the father before maturity to another son, will, in the absence of evidence that the holder of the note paid value therefor, be deemed fraudulent and void as to existing creditors.

Appeal from Mills District Court.—HON. GEORGE CARSON, Judge.

TUESDAY, OCTOBER 28, 1890.

ACTION in chancery by creditors' bill. There was a decree granting the relief prayed for by plaintiff. The defendant and an intervenor appeal.

L. T. Genung and *W. S. Lewis*, for appellants.

Shirley Gilliland and *H. C. Watkins*, for appell ee

BECK, J.—The plaintiff recovered judgment against W. F. Hannah & Co. and John Hannah. Before the judgments were rendered, John Hannah conveyed eighty acres of land to A. J. Hannah. Plaintiff alleges that this conveyance was without consideration, and was made to defraud plaintiff, and prevent the collection of his claim against defendants in the judgments. L. Bently, L. H. Dalhoff & Co. and Anderson, Lewis & Co., who had recovered judgments against defendants, intervened, alleging that the conveyance by John Hannah was fraudulent, and executed to defeat them and other creditors. A. J. Hannah, after the filing of the petitions of plaintiff and intervenors, died, and his administratrix was substituted as a party, and answered the petitions in this case, denying all the allegations

thereof. L. C. Hannah intervened, showing that he was the holder of a note payable to bearer, given by A. J. Hannah for the purchase of the land from John Hannah. He alleges that he purchased the note before maturity for a valuable consideration, and without notice of any equity therein, or of any fraud connected therewith. These pleadings were all denied by the adverse parties.

The questions involved in the case, upon all the issues, are wholly of fact, and demand discussion at no length. The evidence leads the mind to the conclusion that the defendants and the intervenor, L. C. Hannah, who were father and sons, resorted to the expedients of the sale of the lands, the taking of a negotiable note therefor, and the transfer thereof to one of the sons, in order to defeat the judgment creditors who are parties to this suit. That the son to whom the land was conveyed, and the other to whom the note was transferred, had knowledge of the fraudulent purpose of their father cannot be doubted. The note given for the consideration for the land was assigned to L. C. Hannah, and it is not shown that he paid one cent for it, and we are authorized to infer that he did not. Surely a transaction of this character between parties having knowledge of its fraudulent purposes cannot defeat honest creditors.

It is our opinion that the decree of the district court ought to be AFFIRMED.

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COUNCIL BLUFFS LOAN & TRUST COMPANY, Appellant, v. F. A. JENNINGS *et al.*, Appellees.

1. **Attorney and Client: AGREEMENTS OF ATTORNEYS: NEW TRIAL.** An attorney may bind his client by an agreement with opposing counsel for the continuance of a cause from term to term, but no evidence of such an agreement is competent as against a party denying the same, except the statement of his attorney, or the

attorney's written agreement duly signed and filed with the clerk of the court, or an entry thereof upon the records of the court. But where such agreement may be legitimately drawn from the statements of an affidavit of a former attorney for the party against whom the agreement is sought to be enforced, and it appears that a cause has been called to trial contrary to the terms thereof, and in the absence of the opposite party, and of his attorney, a new trial thereof may be properly granted upon the petition of the party injured.

2. ——— : ——— : ——— : PLEADING. Where an application for a new trial, made more than three days after judgment, is by motion, but the same contains an averment in which it is described as a petition, and contains statements and demands for relief which would be proper in a petition, it will be deemed sufficient, especially where objection thereto was not made in the court below.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

TUESDAY, OCTOBER 28, 1890.

THIS is an appeal from an order granting a new trial.

I. Lyman, for appellant.

Charles Mackenzie, for appellees.

ROBINSON, J.—This action was commenced on the fourth day of June, 1885. The petition contains two counts. The first set out as a cause of action a promissory note for the sum of four hundred and forty-eight dollars, made by defendants and one Jennie Dickson. The second set out a promissory note for three hundred and thirty-six dollars, made by Jennie Dickson, and a chattel mortgage given to secure its payment, and alleged that defendants had taken forcible and unlawful possession of the mortgaged property, and had appropriated it to their own use, and that it was of the value of twelve hundred dollars. The petition alleged that a reasonable attorney's fee was the sum of one hundred dollars, and demanded judgment against the defendants for the sum of one thousand dollars,

with interest thereon at ten per cent. per annum from June 1, 1885, and costs. At the August term, 1885, the defendants appeared and filed an answer. In it they alleged full payment of the note set out in the first count of the petition with costs, prior to the first day of the term, and that the payment was accepted in full settlement of that note, and that it was surrendered to them. The answer denied that defendants were indebted to plaintiff in any sum whatever; denied that they had taken unlawful possession of, or converted to their own use, any goods or chattels belonging to plaintiff or upon which he had a mortgage, and denies that they had deprived him of any security. The answer alleges that defendants signed the note set out in the first count of the petition as sureties for Jennie Dickson, and that at the time they signed it she executed and delivered to them a chattel mortgage on the property described in the mortgage of plaintiff to hold them harmless as sureties, and that the mortgage so given to them was duly recorded long before the mortgage to plaintiff was given; that, after the note described in the said first count became due, the principal having failed to pay it, defendants duly and lawfully foreclosed their mortgage, and sold the property therein described for the sum of two hundred and fifty dollars, which was paid to plaintiff; that plaintiff advised defendants to take possession of the property under their mortgage and sell it, and was informed that it was done. Defendants demand judgment for costs. After the filing of the answer plaintiff amended its petition so as to demand judgment for the amount of the note set out in the second count of the petition, with interest, attorney's fees and costs. The cause was then continued at the August term, 1885, and from time to time until the April term, 1889. More than ten days before that term a trial notice was filed by plaintiff, the cause was assigned for trial on the fifth day of April, 1889, in the regular order, and on that day proceedings were had which resulted in a judgment for plaintiff for five hundred and eight dollars and ninety-three cents, an attorney's

fee for thirty-five dollars, and three dollars and fifty cents' costs. The proceedings were had and judgment rendered in the absence of defendants, who did not appear in person nor by attorney. On the nineteenth day of July, 1889, and during the term of court at which judgment was rendered, the defendants appeared and filed an application to have the judgment vacated, supporting the application by affidavits of defendant Jennings, and the attorney for the defendant Traver. Counter-affidavits of attorneys Lyman and Hunter were filed, and the application was submitted on the showing thus made. Before it was ruled upon by the court, plaintiff offered in open court to remit of the judgment in controversy the attorney's fee, and all interest in excess of six per cent. per annum. The offer was refused by defendants, and the application was sustained. Of that ruling appellant complains.

I. The affidavit of Jennings shows that none of the defendants resided within forty miles of Council Bluffs when the action was commenced, nor at any time thereafter; that, immediately after the action was commenced the codefendants of Jennings arranged with him to take charge of the defense, to employ an attorney and prepare the case for trial. He employed J. A. Traver, a practicing attorney of Dunlap, to appear and conduct the defense, and advised him fully of the facts in the case. After the settlement of the note signed by defendants, Jennings was informed from time to time by Traver that the cause was being continued as to the second count of the petition to accommodate the attorneys for plaintiff, and that he would give timely notice of the time of trial. Defendants had no knowledge that a trial would be demanded at the April term, 1889, nor that it had been granted until the fifth day of July of that year, when demand for the payment of the judgment was made upon them by the sheriff of Harrison county. The affidavit of Traver showed his employment by defendant as alleged by Jennings; that at that time the plaintiff was represented by the law firm of Lyman

1. ATTORNEY and client: agreements of attorneys: new trial.

& Hunter, of Council Bluffs, composed of Joseph Lyman and F. M. Hunter; that Traver and Hunter agreed that the cause should not be called for trial at any term of court unless by mutual agreement; that Lyman was a member of congress for the period of four years from the fourth day of March, 1885, and during that time the business of the firm was chiefly done by Hunter; that in April, 1888, it was agreed between Traver and Hunter that the case should not be called for trial until after he had given Traver four or five days' notice, and that Hunter should give Traver personal notice by letter of the time when Lyman & Hunter would be able to try the case; that Traver relied upon said agreements, but received no notice of the purpose of the attorneys for plaintiff to ask for a trial, that the firm of Lyman & Hunter was dissolved about March 10, 1889, and that the case was called for trial by attorney Lyman. The affidavit of Lyman shows that, so far as he had knowledge, no arrangement to continue the cause or to give personal notice of calling it for trial was ever made. The affidavit of Hunter denies the agreements claimed by Traver, but contains a statement as follows: "I further say that the only agreement or understanding I ever made or entered into in regard to such cause, with any person, was as follows: Some time in the early part of the year 1888, I had an understanding with said Traver to the effect that, whereas said cause had been mainly in the care of J. Lyman, and that said Lyman was then a member of congress, and that his term of office would not expire until March 4, 1889, I would not call the case for hearing during said Lyman's term of office in congress, but it was agreed and understood that, if at any time during the said term of office said Lyman should be at home during a term of court and could try the case, I would in that event notify said Traver, and, if an agreement could be reached to that effect, we would try the case. I never had or made any understanding or agreement of any kind in said case which was in any event to extend beyond the term of office of said J. Lyman in congress."

The alleged agreements between Traver and Hunter were verbal and it is said that they cannot be proven for that reason. An attorney has power to bind his client by agreements with respect to any proceeding within the scope of his proper duties and powers, but no evidence of such an agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court. Code, sec. 213 (2). It is not competent, therefore, to prove a disputed verbal agreement of that kind by the testimony of an adverse party or his attorney. *Hardin v. Railway & Construction Co.*, 43 N. W. Rep. 543; *Riegleman v. Todd*, 77 Iowa, 696; *Hiller v. Landis*, 44 Iowa, 223. But it may be proven by the statements of the attorney who made it for the person against whom it is sought to be established. Hunter was such attorney in this case, and the statements contained in his affidavit, and all legitimate conclusions which may be drawn from such statements, may be considered to establish the claim upon which appellees rely. It is clear from the statements of Hunter that an agreement not to call the case for trial during the congressional term of Major Lyman without personal notice was made. It is fair to conclude from admitted facts that the numerous continuances of the cause were for the benefit of the attorneys for plaintiff. Conceding that the agreement was not in fact to extend beyond the fourth day of March, 1889, yet it is apparent that Traver may easily and naturally have fallen into the error of believing that the case would not be called until personal notice of the intention to call it had been given him. The defendants and their attorney resided at a distance from Council Bluffs, where the court was held in which the cause was pending. We think in view of all the facts in this case the defendants were not so negligent as to be debarred from a new trial, and that the court did not err in granting it. *County of Buena Vista v. Railway Co.*, 49 Iowa, 657.

II. It is said that the application should not have been granted, because made by motion which was filed

2. ——: ——: ——: pleading. more than three days after judgment was rendered. Code, secs. 2837–8. The application was in fact in the form of a motion, but it contains an averment in which it is described as a petition, and contains statements and demands for relief which would be proper in a petition. If the objection now made had been presented in the court below we think it might have been properly overruled, and the application treated as by petition. *Town of Storm Lake v. Railway Co.*, 62 Iowa, 218.

The order of the district court sustaining a motion for a new trial is AFFIRMED.

J. H. LANSLEY, Appellant, v. I. C. VAN ALSTYNE *et al.*, Appellees.

1. **Trial to the Court:** FINDINGS: CONFLICT IN EVIDENCE: APPEAL. Where a case at law is tried to the court, and the evidence is conflicting, the findings of fact by the trial court will not be disturbed upon appeal if there is evidence tending to support them.
2. **Sales of Personal Property:** MORTGAGE: EVIDENCE. In an action to recover the possession of personal property the plaintiff claimed title under a mortgage from one W., while defendant's title was based upon a mortgage of prior date from S., the vendee of W. The latter mortgage plaintiff claimed to be invalid as against his, because when his mortgage was received from W. there had been no change in the possession of the property, nor was there any conveyance thereof of record. *Held*, that the possession of the property being an issue to be tried, the defendant's mortgage was properly received in evidence in proof of his title against plaintiff's objection.
3. ——: ——: ——. Testimony of third persons on behalf of plaintiff as to whether they had heard of the sale under which defendant claimed, *held* immaterial.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

TUESDAY, OCTOBER 28, 1890.

ACTION to recover possession of certain personal property. A jury being waived, the case was submitted to the court, and judgment entered in favor of defendants. The plaintiff appeals, assigning as errors the overruling of plaintiff's and the sustaining of defendants' objections to testimony, and the finding and judgment in favor of the defendants.

George W. Wilson and *Henry Rickel*, for appellant.

Cooper & Crissman and *William G. Thompson*, for appellees.

GIVEN, J.—I. Appellant claims the property in controversy under a chattel mortgage executed by J. W. Whetmore, December 19, 1887, to Samuel G. Armstrong to secure a note for three hundred dollars, which note and mortgage were assigned to and are now owned by the plaintiff. Appellees claim the property under a chattel mortgage executed December 5, 1887, to him by Charles Shurtliff to secure a note for one hundred and ten dollars. Appellees' mortgage is prior in point of date, and was duly filed for record on the sixth day of December, 1887. For some time prior to these transactions, Whetmore was in the wood and coal business, and owned and used the property in controversy, together with other property described in the mortgages, in his business. Appellees contend that, prior to the execution of the mortgage by Shurtliff to him, Shurtliff had purchased the property in question from Whetmore, and was the owner thereof at the time he made said mortgage. Appellant contends that the alleged sale to Shurtliff is void as to subsequent purchasers from Whetmore without notice, because the property remained in the actual possession of Whetmore without any written instrument conveying the same having been executed, acknowledged and filed for record. He also contends that said sale was made in pursuance of a

1. TRIAL to the court: findings: conflict in evidence: appeal.

fraudulent combination between Van Alstyne, Whetmore and Shurtliff to cheat and defraud purchasers, creditors and incumbrancers of Whetmore.

The testimony of Shurtliff that prior to the time he made the mortgaged to appellees he had purchased the property mortgaged from Whetmore, and that he owned it at the time of making the mortgage, is uncontradicted. At and after the purchase, Shurtliff continued to use the property in the wood and coal business much as it had heretofore been used. There is a decided conflict in the testimony as to whether the possession was in Whetmore or Shurtliff at the time the mortgage was made to appellees; but the court must have found that the possession was in Shurtliff,—a finding that is not without support in the testimony. Further discussion of the testimony would serve no good purpose. It is sufficient to say that we think the finding of the court has such support that we should not disturb it. We think there is an entire absence of testimony to sustain plaintiff's claim that the sale was in pursuance of a fraudulent combination. Certainly the trial court must have failed to find such combination, and under the state of the proofs we will not disturb the finding of the court upon that issue.

II. Plaintiff objected to the introduction of the mortgage to appellees, on the ground that there had been no change of the possession of the property. There was no error in overruling this objection. The question as to change of possession was the one being tried, and the mortgage was proper evidence.

2. SALES of personal property: mortgage: evidence.

III. The court sustained appellees' objection to inquiries put to one Livingston as to whether Whetmore had wanted to sell him some of the property sold to Shurtliff, and whether he had heard of the sale to Shurtliff, and a similar question to one Frame. There was no error in sustaining these objections, as it was immaterial to the issue whether these witnesses had so heard or not.

3. THE same.

Defendants' motion to strike certain testimony was sustained. We are unable to determine from the record to what part of the testimony this motion was addressed, and cannot determine, therefore, whether there was error in sustaining the motion or not.

Our conclusion is that the judgment of the district court should be AFFIRMED.

DELIA ESTABROOK, Appellant, v. RILEY & ARMIN, Appellees.

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1. **Appeal:** ASSIGNMENTS OF ERROR: ARGUMENT. Errors assigned, but not argued upon appeal, will not be considered by the supreme court.

2. **Mechanic's Lien:** IMPROVEMENT OF WIFE'S PROPERTY BY HUSBAND: FORECLOSURE: DECREE. A decree foreclosing a mechanic's lien against a dwelling-house erected by the husband with his own means is not inconsistent with proof that the ownership of the ground on which such erection was made was in the wife at the date of said improvement.

Appeal from Osceola District Court.—HON. C. H. LEWIS, Judge.

TUESDAY, OCTOBER 28, 1890.

THE plaintiff is the wife of John Estabrook. John Estabrook purchased of the defendant lumber, and with it erected a house on premises belonging to his wife. The defendant thereafter filed its claim for a mechanic's lien against John Estabrook, and obtained a judgment, and the establishment of its lien against the building, and the land on which it was situated. The plaintiff in this suit was not a party to that. The premises were afterwards sold on execution issued on the judgment in which the lien was established, and purchased by the defendant firm. This proceeding is to set aside the judgment and sale on the ground that the plaintiff, Delia Estabrook, was the owner of the land on which the building was erected, and that John Estabrook had

no right or interest therein, and that she was not a party to, nor had she knowledge of, the proceeding in which the lien on the premises was established. The district court so modified the decree as to exempt the land from its operation, but maintained it as to the building, and directed a special execution for its sale to satisfy the judgment and costs. From the judgment of the district court, the plaintiff appealed.

D. D. McCallum, for appellant.

O J. Clark, for appellees.

GRANGER, J.—Errors are assigned, and, as we understand, the cause is before us for trial thereon.

I. The fourth assignment, as to the admission of evidence, is not argued and hence cannot be considered. *Wood v. Hallowell*, 68 Iowa, 377; *Woods v. Whitton*, 66 Iowa, 295. The point has been often ruled.

1. APPEAL: assignments of error: argument.

II. It should be kept in mind that this proceeding assails the judgment by which the lien is established against the property in a suit against John Estabrook. It was determined in that proceeding that John Estabrook had such an interest that the lien was valid and enforceable. Delia Estabrook, not being a party to that suit, institutes this, averring and assuming the burden of proving that John Estabrook had no such interest as would justify the decree entered against the premises, and to that end she says in her petition (paragraph 2) "that John Estabrook never had any right, title or interest in fee simple or otherwise, either in law or in equity, in and to said land." It is stipulated in this suit that, at the time the lumber was purchased, the plaintiff was the owner of the land on which the house was built, but the stipulation goes no further. There is no stipulation, nor is there a word of proof, that John Estabrook had not such an interest, at least in the building, as would justify the lien, and

2. MECHANIC'S lien: improvement of wife's property by husband: foreclosure: decree.

the judgment for its enforcement. Such a lien is given to every person who shall furnish material for any building upon land by virtue of any contract with the owner, his agent, etc., for his materials upon such building and the land belonging to such owner. Acts, 16th Gen. Assem., sec. 3, ch. 100. Section 10 of the same chapter provides that "every person for whose immediate use or benefit any building * * * is made * * * shall be included in the word 'owner' thereof." Hence, if John Estabrook had such a right or interest in the land that the house was erected for his immediate use or benefit, he was such an owner as the law contemplates for making contracts to be followed by a mechanic's lien. We need not say that the ownership extends beyond the building itself, nor even that he owned the building, beyond the fact that it was erected for his immediate use or benefit. It must be assumed that the judgment establishing the mechanic's lien has the proper facts for its support, until the contrary is shown. Such a right or interest in the land that the house could be erected for the immediate use or benefit of John Estabrook is by no means inconsistent with the title or ownership of the land being in the plaintiff; and the mere proof of such ownership by the plaintiff does not disprove the facts giving rise to a lien through a contract with John Estabrook. That one person might own land, and another legally erect a building thereon for his own use or benefit, would not be questioned. In such a case the beneficiary is the owner under the provisions of the law as to mechanics' liens.

We need not pursue this case further. It is simply a case of failure of proofs. With the state of this record, it is at least a matter of doubt if the judgment as originally entered was not valid. The defendant does not appeal, and hence the judgment cannot be modified in its favor, and we need not consider the point.

The judgment below is AFFIRMED.

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CASS COUNTY BANK, Appellant, v. C. C. CONRAD *et al.*, Appellees.

1. **Practice**: RECORD: APPEAL. Where the evidence submitted on the trial of a cause is not made a part of the record in the district court, an abstract presenting the same on appeal to the supreme court will, on motion, be stricken from the files.

2. **Highways**: TOWNSHIP TRUSTEES: AUTHORITY. Township trustees have no authority under the law to borrow money for the improvement of the highways of the township, nor to make the improvement of the highways in one district a charge upon the other districts of the township, and orders issued by the trustees upon the township clerk for that purpose, and for which no fund has been provided, are invalid.

3. ———: ———: ———: ESTOPPEL. The township trustees having agreed that the township clerk should receive certain moneys held by the county treasurer, and that therewith all the *legal* debts of the township should be paid, the county treasurer paid to said clerk the proceeds of a tax levied and collected for the payment of the orders above referred to. *Held*, that the orders not being a *legal* debt, the officers of the township were not estopped, under their agreement, from denying liability for the money so received.

Appeal from Cass District Court.—HON. GEORGE CARSON, Judge.

TUESDAY, OCTOBER 28, 1890.

ACTION of *mandamus* to compel the payment of certain orders issued by township trustees. There was a trial by jury, and judgment for defendants. The plaintiff appeals.

C. F. Loofbourow, for appellant.

H. G. Curtis and *H. A. Disbrow*, for appellees, the trustees and clerk of Grove township.

John W. Scott, for appellees, the trustees and clerk of Atlantic township.

ROBINSON, J.—During the year 1881, and for many years prior to January, 1886, the territory included within congressional township 76, north, of range 36, west, constituted the civil township of Atlantic, which included the city of Atlantic. In the year 1885, the township was subdivided, and two civil townships created, one of which, known as the "Township of Atlantic," included the territory within the corporate limits of the city; and the other, known as the "Township of Grove," included all the territory of the old township outside the city limits. The organization of the new townships was perfected in January, 1886. In the years 1881 and 1882, the trustees of the township of Atlantic, as it was then constituted, issued orders on the township clerk, to the amount of eight hundred and sixty dollars and fifty-five cents, on account of money advanced by plaintiff, to be used in paying for work and improvements on the highways of the township outside the city of Atlantic. Of the money so advanced the sum of six hundred and seventy-five dollars and fifty-five cents is unpaid, and is represented by the orders in suit. No fund was provided for the payment of the orders before they were issued. In April, 1885, the township trustees levied a tax to provide a fund for the payment of the orders. The proceeds of that tax were paid to the clerk of the new township of Grove, and, in March, 1886, he had on hand two hundred and forty-three dollars and sixty-three cents; but it has since been paid out, and it does not appear that he now has any money which was paid on account of the tax in question. The assessments of property outside the limits of the city of Atlantic for the year 1871, and all subsequent years to and including the year 1885, were made and kept separate from the assessments of property within the city, and all road taxes were collected from property outside the city. The plaintiff demands that the road taxes collected for the year 1885 be applied in paying its orders, and that the trustees of Grove and Atlantic

townships be required to levy and collect a sufficient tax to pay the amount due upon the orders, with interest and costs. The district court denied plaintiff all relief, and rendered judgment in favor of defendants for costs.

I. Appellees have filed an additional abstract, which purports to set out evidence submitted on the trial in the district court. It is made to appear that none of the evidence submitted was made of record as required by law, and a motion of appellant to strike the additional abstract from the files will be sustained. The case must be disposed of here on the facts admitted by the pleadings, and shown by the special findings of the jury.

1. PRACTICE: record: appeal.

II. The trustees of each township are required to meet on the first Monday in April of each year, or as soon thereafter as the assessment book is received by the township clerk, and levy the tax needed for road purposes. Code, sec. 969. They are required to set apart such portion of the tax, so levied, as they may deem necessary for the purpose of purchasing tools and machinery, and paying for guide boards authorized by law, and the portion of the tax so set aside shall constitute a general township fund. Sec. 970. The fund so created shall be expended as the trustees shall direct. Sec. 971. The money tax levied upon the property in each road district, except that portion set apart as a general township fund, whether collected by the road supervisor or county treasurer, shall be expended for highway purposes in the district from which it was collected, and no part of it shall be used for the benefit of any other district. Sec. 982. It is the duty of the road supervisor to cause all taxes collected by him, excepting the portion set apart for the general township fund, to be expended for the purposes specified by law. Sec. 981. He is entitled to receive, and is required to expend, in the same manner, the taxes collected by the county treasurer from property in his district, and paid to the township clerk. *Henderson v. Simpson*, 45 Iowa, 519.

2. HIGHWAYS: township trustees: authority.

Prior to the enactment of chapter 200 of the Acts of the Twentieth General Assembly, no authority was vested in the township trustees to expend any of the road tax, excepting that part which constituted the general township fund. The authority conferred by section 996, to order the distribution of the fund in the hands of the township clerk, relates to the general township fund. *Henderson v. Simpson, supra.* The orders in suit were issued to pay for improving highways in two of the nine districts into which the township of Atlantic was divided. The transaction was, in effect, a loan of money by plaintiff to enable the township trustees to improve highways within their township, and was not authorized by law. It was not the duty of the trustees to improve the highways in the manner attempted, and they had no authority to borrow money or incur debts for that purpose. When extraordinary expenditures are required, and the road supervisor has not funds in hand sufficient for the purpose, certificates may be issued, receivable in payment of road taxes. Code, secs. 991, 992. The fact that the township used the highways improved with the money advanced by plaintiff, and received and enjoyed the benefits which the use of the money conferred, does not alter the case. The plaintiff and the trustees knew all the material facts, and are presumed to have known the law when the agreement was made, and the money advanced. They knew, therefore, that the agreement, by virtue of which it was procured and used, was not authorized by law. They were not misled in any manner, and it was not the duty of the road supervisors, or other officials, to stop the making of the improvements. It is not uncommon nor improper for improvements in highways to be made by private persons, where the public funds available are insufficient; and, while such improvements may be prevented, yet, if they are made, no liability against the property of the township or road district is thereby created. A further objection to the action of the trustees in this case is that it sought to use the road

fund of nine districts for the benefit of but two. The statute would not permit that to be done.

III. In February, 1886, the trustees of the new townships met, and agreed that the clerk of the township of Grove should receive all money in the hands of the county treasurer, and all money which he should thereafter collect on account of taxes levied on property within the territory of the township of Grove, and that said township should pay all legal debts which had been contracted on account of the township of Atlantic prior to the completion of the division. Under that arrangement, the taxes of the year 1885, collected by the county treasurer, were paid to the clerk of Grove township. Plaintiff contends that the officers of that township are estopped from denying liability for the money so received. The agreement did not require the payment of illegal debts. The money paid over under it was collected from property within the limits of the new township of Grove for road purposes. Although it was levied for the purpose of paying the orders in suit, yet it could not have been used for that purpose, for reasons already stated. As no part of it constituted a general township fund, it could only be expended by the supervisors of the road districts from which it was collected.

s. —: —: —: estoppel.

In our opinion, the judgment of the district court is correct. It is, therefore, AFFIRMED.

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McNAMARA & McCARTY, Appellants, v. HARRISON & GREEN, Appellees.

Labor Contracts: PAYMENT ON CERTIFICATE: PERFORMANCE. A contract for grading the road of a railway company provided that eighty-five per cent. of the price therefor should be paid in monthly installments as the work progressed, and the balance within fifty days after the completion of the work, and the production of a certificate of an engineer therein named as to the quantity of work done, to be determined by measurements taken

after the completion. Measurements of the work done were made by an assistant engineer each month, but these were for the purpose merely of estimating the amount payable under the provision for payment of the monthly installments. *Held*, that the provision of the contract requiring a certificate from the engineer as to the amount of work done before final settlement was valid; that the measurements taken monthly were not a compliance with such provision, and that plaintiffs were not entitled to maintain an action for the balance alleged to be due them under such contract until fifty days after the production of the certificate of the engineer therein named, or a showing of sufficient excuse for not producing the same.

Appeal from Woodbury District Court.—HON. C. H. LEWIS, Judge.

TUESDAY, OCTOBER 28, 1890.

THE plaintiffs seek by this action to recover a balance claimed to be due upon a written contract by which plaintiffs undertook to do certain grading on a branch of the Chicago, Milwaukee & St. Paul railroad. There was a trial by jury. After the evidence was introduced the court directed the jury to return a verdict for the defendant. The plaintiffs appeal.

Joy, Hudson, Call & Joy, for appellants.

J. M. Cleland and *J. H. & C. M. Swan*, for appellees.

ROTHROCK, C. J.—I. The defendants were contractors for the construction of a branch of the Chicago, Milwaukee & St. Paul railroad from Sioux City to Manilla in this state. They entered into a written contract with the plaintiffs by which the plaintiffs undertook to grade a part of the line. The plaintiffs claim that they completed their contract, and that the defendants have failed and refused to pay them in full for said grading, and that there is a balance of about one thousand dollars yet due. The contract provided that plaintiffs were to receive for making embankment the sum of fifteen cents per cubic yard, and the same price

for making earth excavations, except that in making excavations all earth removed within an extreme haul of twelve hundred feet, and deposited in embankments, payment should be made for excavations only. If earth removed from excavations should be hauled more than twelve hundred feet, plaintiffs were to be paid in addition for said hauling one cent per cubic yard for each one hundred feet beyond the first twelve hundred. It is claimed that after entering into the contract, and commencing the work, an assistant engineer of said railroad company directed the plaintiffs to excavate and waste a large quantity of earth from a deep cut, which required them to borrow and haul earth to make an adjacent embankment; that after the work was completed an estimate was made by the engineers by which all of the earth used in the embankment was estimated as though it had been hauled from the excavation. This manner of estimating the work reduced the amount to be paid to plaintiffs, and plaintiffs claim judgment for the difference.

It is averred in the petition that the final estimate or measurement of the work was false, fraudulent, untrue and contrary to the facts, and "was made collusively and fraudulently in collusion with the defendants." The defendants denied the alleged fraud. And to the end that we may come as speedily as possible to the real questions in the case it is sufficient to say that there was no evidence of fraud. It appears that the defendants had nothing whatever to do in counseling or directing the manner in which the estimate should be made. The contract was in the usual form. It provided for monthly estimates to be made as the work progressed, and for payment of eighty-five per cent. of these estimates. The other fifteen per cent. was to be retained until the completion of the work. These monthly estimates were made in a hurried manner, and were not supposed to be entirely accurate. It is conceded that these monthly estimates were made upon

the basis of the work as it actually was without reference to whether it was properly done or not, and that payments were made accordingly. When the work was completed the whole of the excavations and embankments were measured, and this was to be the basis for the final settlement.

The contract is quite voluminous, and we need not copy it in full; there are two of its provisions, however, which we think are decisive of the rights of the parties so far as this action is concerned. Said provisions are as follows: "Par. 4. It is mutually agreed between said parties, that to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, the said chief engineer shall be, and hereby is made, an umpire to decide all matters arising or growing out of this contract between them, and the decision of said chief engineer on any point or matter touching this agreement shall be final and conclusive between the parties hereto, and each and every one of said parties hereby waive any and all right of action, suit or suits, or other remedy, in law or otherwise, under this contract, or arising out of same."

"Par. 17. And the said first party, in consideration of the fulfillment and performance of all the stipulations contained in this contract by said second party to be by such second party fulfilled and performed, and whenever said work shall have been, in the opinion of said chief engineer, completely finished in every respect, and performed agreeably to the various stipulations and specifications of this agreement, and said chief engineer shall have furnished to said first party a certificate of the fact under his hand, together with his estimates of the quantity of the various kinds of work done by said second party under this agreement (which estimate shall be final and conclusive between the parties hereto), will pay to said second party any balance due within fifty days after said certificate shall have been furnished by said chief engineer, the

sum which may be due under this contract, agreeably to said estimate, at the following rates and prices:" * * *

The defendants set up these clauses of the contract as a bar to the action. It appears from the evidence that the contractors were under the immediate supervision of one Watts, who was what is denominated a resident engineer. Watts was under the control of one Stevens, who was a division engineer, and had charge of the work of the whole line. These engineers were under the control of the chief engineer of the Chicago, Milwaukee & St. Paul Railway Company. No certificate, such as is contemplated by the above provisions of the contract, was introduced in evidence, and there was no evidence that any such certificate was ever at any time made by the chief engineer; and there was no excuse offered for the commencement of the action without such certificate having been made. It is claimed by counsel for appellant that the defendants, by their acts in adopting a final measurement of the work made by the division engineer Stevens, waived this condition precedent to the right to maintain the action. But we find no evidence of such waiver. It is true they paid the plaintiffs the full amount due as shown by the estimate made by Stevens, but this is no evidence of a waiver.

It is further claimed that the estimate made by Stevens is a compliance with the requirement that a certificate shall be made by the chief engineer. It is surely not a compliance with the contract in terms. The parties expressly contracted for a certificate signed by the chief engineer, and "his estimate of the quantity of work done by the plaintiffs," and the balance due was not payable until fifty days after the certificate was made and furnished. The parties contracted that they would settle and pay upon a certificate of the chief engineer. They did not bind themselves to act upon the estimate of a subordinate engineer. It may be correct, as claimed by counsel for appellant, that the part of the provisions of the contract above quoted which make the chief engineer an arbitrator or umpire between

the parties, and by which all rights of action under the contract are waived is void; but it is not claimed that the parties may not bind themselves to make payment or settlement upon the certificate or estimate of some third person, such as an engineer, architect or the like. Such contracts have uniformly been upheld by the courts. 1 Am. & Eng. Ency. of Law, p. 668; *Loup v. California Southern Ry. Co.*, 11 Am. & Eng. R. R. Cases, 589; *Smith v. Briggs*, 3 Denio, 73; *Morgan v. Birnie*, 9 Bing, 672; *Holmes v. Richet*, 56 Cal. 307; *Hennick v. Sewall*, 27 Vt. 673; *Fannce v. Burke*, 16 Pa. St. 469; *McMahon v. N. Y. & Erie Ry. Co.*, 20 N. Y. 463; *North Lebanon Ry. Co. v. McGrann*, 33 Pa. St. 535.

Until it is shown that the chief engineer has made the required certificate, or there is some good reason why it has not been furnished, no action can be maintained. It may be that such a certificate would award to the plaintiffs, all that they claim, and, if so, this controversy would no doubt be speedily settled. The judgment of the district court is AFFIRMED.

A. J. NURSE, Appellee, v. D. SATTERLEE, Assignee, Appellant.

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1. **Assignment for Benefit of Creditors: PREFERRED CLAIMS FILED WITH ASSIGNEE: WAIVER.** The filing of proof of a claim preferred by law with the assignee of an insolvent estate under a general assignment for the benefit of creditors, will not operate as a waiver of such preference, and compel such creditor to share *pro rata* with the rest of the creditors.

2. ——— : **BANKS: MONEY DUE ON COLLECTIONS.** The plaintiff deposited with a bank at D. for collection a foreign letter of credit, receiving a receipt therefor. The letter was forwarded by the bank for payment, and, a draft being subsequently received in payment thereof, it indorsed the same over to a bank at C. to be placed to the former's credit in its exchange account, and entered upon its journal the amount due under the letter of credit to the credit of plaintiff, and made a like entry on the credit side of the bank's ledger. Subsequently, and before payment of the letter of credit to plaintiff, the bank at D. made a general assignment for the benefit of creditors; the bank at C. having at the time a sum

much greater than the draft above referred to to the credit of the bank at D. *Held*, that the relation between plaintiff and the bank at D. was not that of debtor and creditor, but of principal and agent; and that the money collected was in the nature of a trust fund, to which the plaintiff was entitled as against the assignee and creditors of the bank of D.

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

TUESDAY, OCTOBER 28, 1890.

THIS action is based upon an agreed statement of facts. The subject-matter of the controversy is the proceeds of a certain draft or letter of credit which the Exchange Bank of Dunlap collected for the plaintiff. After the collection the bank became insolvent, and made an assignment for the benefit of its creditors. The defendant Satterlee is the assignee, and the contention between the parties is, whether the plaintiff should recover the full amount of the collection, or merely the *pro rata* amount due to the common creditors of the bank. The district court rendered a judgment and decree for the full amount of the claim, and the defendant appeals.

Charles McKenzie, for appellant.

No appearance for appellee.

ROTHROCK, C. J.—I. The material facts as disclosed by the agreed statement are as follows: The plaintiff delivered the letter of credit to the bank on the thirty-first day of October, 1888, and the bank delivered to him a receipt in these words:

1. ASSIGNMENT for benefit of creditors: preferred claims filed with assignee: waiver.

"October 31, 1888.

"Received from A. J. Nurse for collection letter of credit for one hundred and seventy-nine pounds, nineteen shillings and seven pence, from London and Coventry Banking Company. Two hundred dollars advanced on same. L. A. SHERMAN,

"Cashier."

The plaintiff at that time had just removed from England to the United States. He fixed his residence in the city of Omaha, Nebraska, about, or in a short time after, November 1, 1888. The draft or letter of credit was delivered to the bank by C. H. Nurse, the plaintiff's agent, and the two hundred dollars advanced was paid by the bank to said agent. On the sixth day of November, 1888, the said bank sent the said letter of credit to the Bank of Montreal at Chicago, and by letter requested a remittance of the proceeds to said Exchange Bank. On the eighth day of November, 1888, the Bank of Montreal sent the following letter to the Exchange Bank:

"CHICAGO, ILLINOIS, November 8, 1888.

"*To Cashier Exchange Bank, Dunlap, Iowa.*

"DEAR SIR:—In payment of your collection, London and Coventry Banking Company, one hundred and seventy-nine pounds, nineteen shillings and seven pence, received in your favor of the sixth inst. We inclose draft on Bank of New York, eight hundred and seventy-two dollars and forty-five cents, exchange eighty-four and three-fourths cents. We trust that you are satisfied as to the identity of payee.

"Yours truly,

"J. H. MUNDT,

"Manager."

On the tenth day of November, 1888, the Exchange Bank made the following entry on its journal: "Arthur Nurse, proceeds of letter of credit, six hundred and seventy-one dollars," and a like entry was made at the same time on the credit side of the ledger of the bank. Prior to the fifteenth day of November, 1888, the cashier of the Exchange Bank advised the said C. H. Nurse of the fact that the proceeds of said letter of credit had been received by the bank. At or about the same time the said C. H. Nurse notified the plaintiff by letter that the money had been collected, and that the proceeds were held by the Exchange Bank subject to plaintiff's order. On the same day that the Exchange Bank made the above entries upon its journal and

ledger, it sent the draft for eight hundred and seventy-two dollars and forty-five cents to the Council Bluffs Savings Bank with directions to place the same to the credit of the Exchange Bank, which was done. The Exchange Bank had for some time kept an account with the said Council Bluffs Savings Bank against which it drew drafts. The account was kept in the usual manner, and was credited with remittances made and charged with drafts drawn by the Exchange Bank. On the fourteenth day of January, 1889, the said Exchange Bank made a voluntary assignment for the benefit of its creditors. The defendant is the assignee, and the assets of the bank are insufficient to pay the creditors. This was the only transaction the plaintiff ever had with said bank, and he has not been paid anything upon said collection, excepting the two hundred dollars as above stated. On the fourth day of March, 1889, the plaintiff filed with the defendant, as the assignee of said bank, his claim arising out of the receipt by said Exchange Bank of the proceeds of the letter of credit. At the time the assignment was made by the bank, there were two thousand dollars standing to its credit in the Council Bluffs Savings Bank.

It is urged in behalf of appellant that the plaintiff, by filing his claim with the assignee for allowance as a creditor of the insolvent bank, waived all right to other or greater payment than that to which the general creditors were entitled. We do not concur in this view. For aught that appears the plaintiff may have believed, when he filed the claim, that the assets would be sufficient to pay all the creditors in full. The filing of the claim did not operate to the prejudice of the rights of anyone. No creditor of the bank has been misled or lost any advantage by it. The defendant assignee has not changed his position, nor incurred any liability thereby. There are no facts shown which amount to a waiver or estoppel as against the plaintiff. See *McLeod v. Evans, Assignee*, 66 Wis. 406; 28 N. W. Rep. 173, 214.

II. It is urged with apparent confidence by counsel for appellant, that the facts establish the relation of debtor and creditor between the plaintiff and the bank, and that the plaintiff has no more right to a preference in payment than any other depositor in the bank. Surely, it ought not to be claimed that any such relation as depositor was intended by the parties in the first instance. The plaintiff delivered the letter of credit for collection. He did not take a certificate of deposit, but an ordinary receipt for a collection. When the collection was made there was no change made in the relation of the parties. The entry made in the bank-books did not change the transaction to a deposit. Even if the officers of the bank had made it appear by the bank-books that the transaction was a deposit, it would not have affected the rights of the parties. The plaintiff could not be transformed into a depositor without his consent. The only fact in the case tending in the least degree to show any other relation than that of principal and agent is that the plaintiff did not call for his money at once upon being notified that it had been collected. But this delay does not authorize the finding that the plaintiff regarded the bank as bearing any other relation to him than that of a collector. The money was, therefore, held by the bank in the nature of a trust fund. Instead of keeping the trust funds separate and apart from other funds of the bank, it was deposited with the Council Bluffs Savings Bank, and, when the assignment was made, there was a balance in that bank in favor of the Exchange Bank amounting to two thousand dollars. Under this state of facts the plaintiff is entitled to full payment. We have recently had occasion to examine quite fully the same question on principle in the cases of *Independent Dist. of Boyer v. King*, 80 Iowa, 497, and in *Davenport Plow Co. v. Lamp*, 80 Iowa, 722. It is sufficient to refer to those cases, and the authorities therein cited. We might say, however, in conclusion, that the case is very much the same in its facts as that of *McLeod v. Evans*, *supra*, with the

2. —: banks: money due on collections.

exception that, in that case, the money collected could not be traced to any distinct fund. Here it is to be found as a deposit in the Council Bluffs Savings Bank. This difference in the cases is the ground upon which a dissenting opinion was based in the cited case.

The judgment of the district court is AFFIRMED.

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R. DAVIS, Appellee, v. WESTERN HOME INSURANCE COMPANY, Appellant.

Fire Insurance: POLICY: CONDITIONS AS TO RISK: CONSTRUCTION. **The use of a corn-sheller, together with an engine and boiler for the purpose of propelling same, is within the meaning of a provision in a policy of insurance against fire, declaring that such policy will be rendered void if, without permission in writing thereon, "there be any change in the exposure, by the erection or occupation of adjacent buildings, or by any means whatever within the control and knowledge of the insured."**

Appeal from Cass District Court. — HON. H. E. DEEMER, Judge.

TUESDAY, OCTOBER 28, 1890.

ACTION on a policy of insurance to recover for the loss sustained by plaintiff, by reason of the destruction by fire of the property insured. There was a judgment upon a verdict for plaintiff. The defendant appeals.

Cummins & Wright and *Phelps & Temple*, for appellant.

Willard & Willard, for appellee.

BECK, J.—I. The policy upon which the action is brought covered ear corn contained in two cribs. Upon one crib the amount insured was sixteen hundred and sixty-five dollars; on the other, three hundred and thirty-five dollars. The crib first named was burned, and the corn contained in it destroyed. The plaintiff seeks, in this action, to recover for this loss. The policy

contains a condition in the following language: "The policy shall be void and of no effect if, without permission therefor in writing hereon, the assured shall now have, and hereafter make or procure, any other contract of insurance on property covered in whole or in part by this policy, * * * or if there be any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured. * * *" The evidence tended to show that the assured brought, or caused or permitted to be brought and operated, a sheller propelled by steam, and the engine and boiler furnishing the power, quite near the corn-crib, and that the fire originated from, and was caused by, the use of such engine in dangerous proximity to the corn-crib. Thereupon the court below gave to the jury the following instruction: "It is provided in the policy 'that this policy shall be void and of no effect if, without permission therefor in writing hereon, there be any change in the exposure, by the erection or occupation of adjacent buildings, or by any means whatever within the control and knowledge of the assured.' Now, the construction of this clause is for the court to determine, and the effect of it is that the exposure referred to therein, in order to avoid the policy, must be by the erection or occupancy of an adjacent building, or by some means of like character; that is, some permanent erection or structure must have been placed in proximity to the crib which contained the corn, or the occupancy of some building standing at the time the policy was issued, adjacent to the said crib, must have been changed so as to increase the hazard, in order to come within the terms of this provision. And the use of a steam-power to run a sheller in shelling the said corn would not come within the prohibitory clause of the policy referred to in these instructions."

II. In our opinion the court below erred in this instruction. It is plain that the policy cannot bear the construction therein put upon it It will be observed that the condition of the policy in question is against

"change in exposure." The word "exposure" means "the state of being exposed," "openness to danger; accessibility to anything that may affect especially detrimentally." It is a word much used in the business of insurance, in the sense of this definition, to indicate danger of destruction or injury by fire, to property insured, from external sources, and not inherent to the property itself. The word does not in the meaning contemplate any particular source of danger. If danger results to the property from contiguous buildings because of their occupation, from pursuits, whether carried on in a building or out of it, from the practice or habit to use fire, from the running of railroad locomotives, and the like, they are said to be exposures to the property. The condition of the policy is against any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control of the assured. Exposure from "the erection or occupation of adjacent buildings" is especially prohibited by specific language. All exposures "by any means whatever" are forbidden by general language.

Counsel insist that "it is a general rule in the construction of contracts and statutes that, when general words follow special words, the general words are controlled and governed by the special words." The rule is not accurately stated as it is found in the authority cited by counsel. 2 Pars. Cont. p. 13, note 2. It is there stated in this language: "When, in a statute, general words follow particular ones, the rule is to construe them as applicable to subjects *ejusdem generis*." We may assume what is probably true, that this rule applies to contracts. The condition of the policy under consideration is against exposures. The erection or occupation of adjacent buildings is specially named, as causes producing exposure. In the general language, exposures, "by any other means whatever within the control or knowledge of the assured," are forbidden. The special words forbid "the erection and occupation of adjacent buildings" so as to change or increase the exposure.

If they are erected and occupied for the use therein of dangerous elements, as fire, the exposure is increased. Now it is the use of the element of fire, or other dangerous thing, that is provided against. It is plain that the buildings *per se* are not exposures, and it is equally plain that anything which causes the use of fire or other dangerous elements, by which a building is made an exposure, is *ejusdem generis*. The rule as applicable to this case does not mean that the cause of an exposure, contemplated by the general words of the condition, shall be buildings or something of the same nature or character, but shall be *ejusdem generis*, of the same nature, kind or character, in causing exposure to fire. In our opinion the condition of the contract has not regard to the form, substance, use or character of the thing creating the exposure. But anything in which fire is used so as to be dangerous, or any occupation when it is so used, or any acts, habits or customs endangering the insured property, which are within the control or knowledge of assured, causes an exposure within the meaning of the conditions of the policy under consideration.

Other questions argued by counsel need not be considered, as the views we have expressed are decisive of the case upon this appeal. The judgment of the district court is REVERSED.

NELLIE L. HARDING, Appellant, v. DES MOINES NATIONAL BANK, Appellee.

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Mortgage of Real Estate: EXECUTION IN BLANK: HOMESTEAD: CANCELLATION: EVIDENCE. In an action in equity to obtain the cancellation of a mortgage upon the ground that the plaintiff, a married woman, had signed the same with the property description blank, and that subsequently her husband, before delivery to defendant, inserted the description of property constituting their homestead, it appeared that the mortgage was prepared by the attorney for the defendant, upon an ordinary printed form, all blanks being properly filled ready for execution, except that for

the description of the property mortgaged, which blank was afterwards filled by defendant's husband by inserting the description of the homestead in question. The mortgage was acknowledged before a notary in the bank, and both the plaintiff and her husband testified positively that at the time of such acknowledgment the instrument contained no description of the property in question. In this they were partially corroborated by two witnesses. On the other hand the notary and defendant's cashier were equally positive that the mortgage did then contain such description, and they were corroborated by the presumption arising from the condition of the mortgage at the time of the trial, and by the testimony of the president of the bank. *Held*, that it was not shown by a preponderance of the evidence that the description of the homestead was not contained in the mortgage at the time of plaintiff's acknowledgment thereof.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

TUESDAY, OCTOBER 28, 1890.

ACTION in equity to declare a certain mortgage from plaintiff and her husband to the defendant null and void. Decree was entered dismissing plaintiff's petition, from which she appeals.

Kauffman & Guernsey, for appellant.

Mitchell & Dudley, for appellee.

GIVEN, J.—I. A proper consideration of this case requires that we first determine just what issues are joined in the pleadings. The plaintiff for cause of action alleges that about the ninth day of April, 1885, she and her husband, B. L. Harding, signed the instrument in question; that when so signed it contained no description of any property of any kind, and that in that condition it was delivered to the defendant, and that thereafter her husband inserted the description of their homestead in said paper; that the paper as signed and delivered to the defendant bank was absolutely null and void, and of no binding force and effect; and that, notwithstanding the premises, the defendant has

placed said paper upon record, and claims that it is a valid and subsisting lien by way of mortgage upon plaintiff's homestead. Plaintiff prays that said paper be declared to be null and void, and that the same be canceled and decreed to be no lien upon said homestead. The plaintiff sets out as an exhibit to her petition a copy of the instrument as it is alleged to have been at the time it was signed and delivered, which is the usual form of a mortgage upon real estate, complete in all respects except that it contains no description of any property as mortgaged. The defendant answering denies that said mortgage, when signed by plaintiff and her husband, contained no description of any property; that it was in condition as shown by the exhibit when delivered to the defendant; that B. L. Harding thereafter inserted the description of the property, and denies that the mortgage as signed and delivered was null and void.

It will be observed that the only ground upon which relief is asked is that the mortgage was blank as to the description of any property at the time plaintiff signed it. The allegation that the instrument as signed and delivered was null and void is the averment of a conclusion from the alleged fact that it was signed in blank, and not the statement of an additional ground for relief. While it is true the allegation is that the instrument contained no description of any property when signed and delivered, we need not inquire as to its condition at the time of delivery, except as that may tend to show its condition at the time plaintiff signed it. Plaintiff is entitled to the relief asked, if at all, because of the instrument being blank at the time she signed it, even though it was filled in before delivery. The sole question to be determined is, whether the description of the homestead now appearing in the mortgage was therein at the time plaintiff signed it, and, if not, whether, under the law, that renders the mortgage void as to the homestead. Counsel discuss other questions, such as whether appellant authorized her husband to

insert the description of their homestead in the mortgage on condition that other securities would be included so as to first become liable for the debt; whether she signed the mortgage because of misrepresentations as to the amount of the indebtedness secured, and the legal effect of the facts. These questions are not involved in the issues. Appellant does not allege as grounds for relief, or otherwise, that she authorized her husband to insert the description of their homestead upon condition that other securities should be included, nor that she was deceived as to the amount of the indebtedness to be secured.

It appears that on and prior to April 8, 1885, Mr. Harding was indebted to the defendant bank in the sum of at least eight thousand dollars, for which the bank was demanding security. Mr. Harding, desiring to secure the bank, and to procure further loans, agreed to give a mortgage upon the homestead of himself and wife, the appellant, worth thirty to thirty-five thousand dollars. The mortgage in question was prepared upon an ordinary printed blank form by the attorney of the bank, all the blanks being properly filled ready for execution, except that for the description of the property mortgaged, which blank was afterwards filled by Mr. Harding's inserting therein a description of the homestead of himself and wife. The mortgage and notes it was given to secure are dated April 8, 1885, and the mortgage contains a certificate of acknowledgment by Mr. and Mrs. Harding, in due form, before V. F. Newell, notary public, dated April 9, 1885. After being signed and acknowledged, the mortgage was either then or on the next day delivered to the bank, and a further loan of three thousand dollars made to Mr. Harding. There is no question but that on the ninth day of April, 1885, Mrs. Harding and her husband did appear before Mr. Newell, and sign and acknowledge the instrument in question. The contention is, whether it then contained the description of their homestead. Upon this subject there is a marked conflict in the testimony. Mr. and Mrs. Harding each

testify with positiveness that the instrument contained no description of any property at the time they signed and acknowledged it, and relate the circumstances under which the appellant claimed the description was afterwards inserted. They are corroborated to some extent by the testimony of S. B. Gafford and Henry Stivers. William E. Hazen, who was then cashier of the bank, and Mr. Newell, the teller and notary, each testify, with equal positiveness, that the mortgage did contain the description of the homestead at the time appellant and her husband signed and acknowledged it. They are corroborated by the presumption that arises from the present condition of the mortgage, and the testimony of John Wyman, president of the bank. Numerous facts were called out by each party tending to affect the weight of the testimony given in favor of the other. Many pages have been devoted to a discussion of the conflicts in the testimony. To follow this discussion would extend this opinion to an unwarranted length, and would not serve as a precedent for future cases. The reasons for our conclusion as to the weight of the testimony cannot be presented intelligibly without setting out the testimony at length. This we deem unnecessary. It is sufficient to say that we have examined the testimony and arguments with care, and are led to the conclusion that the plaintiff has failed to show by a preponderance of evidence that the mortgage in question did not contain a description of her homestead at the time she signed and acknowledged the instrument.

Having reached this conclusion, it is unnecessary that we determine what effect it would have had upon the validity of the mortgage as to the homestead if it had been blank as to the property mortgaged at the time appellant signed and acknowledged it. Our conclusion is that the decree of the district court should be AFFIRMED.

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LUELLA J. BROOKE, Administratrix, Appellee, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

1. **Railroads**: CONSTRUCTION OF SWITCH: NEGLIGENCE: PERSONAL INJURY. In an action to recover damages for personal injury to plaintiff's intestate, while employed as a brakeman on defendant's railroad, based upon the negligence of defendant in maintaining a "split switch" in a defective condition, whereby the defendant's foot was caught between the rails while coupling, and he was thrown down and injured, the jury found specially that the defendant was not negligent in maintaining such a switch at the point in question, but that the switch was not constructed as such switches generally are, and that it was out of repair, the rails being too far apart, and returned a general verdict for the plaintiff. The evidence showed that at the point of the switch the rails could be set within two and one-half inches of each other or less, and the danger complained of be avoided, whereas the rails of the switch in question were about three and three-fourths inches apart, and were likely to catch the foot and hold it fast. *Held*, that the evidence warranted the jury in finding that plaintiff's intestate was injured through the negligence of the defendant.

2. ——: ——: ——: EVIDENCE. After the testimony of defendant's station agent, where the accident occurred, that he had held such position prior to the time of the accident and up to the time of the trial, and did not know of any change in the switch in question having been made, one of the plaintiff's attorneys was permitted to testify as to the result of his measurements of the distances between the rails at the switch, fourteen months after the accident, and of experiments made by him in placing his foot between the rails, and showing where the foot could be caught and where not, the shoe worn by defendant being before the jury at the time. *Held*, that the evidence was competent.

3. ——: ——: ——: ——. There was no direct evidence that the foot of the deceased was caught in the switch, and was the cause of his fall, but his shoe worn at the time was introduced in evidence, and presented a wrenched appearance. *Held*, that this evidence, considered in connection with the circumstances under which the accident occurred, was sufficient to support a finding that the deceased fell through having his foot so caught.

4. ——: ——: ——: INSTRUCTIONS TO JURY. An instruction to the jury that they should "determine whether or not the switch was properly constructed; that is to say, whether it was in perfect order or repair;" that "the defendant was bound to exercise

ordinary care in keeping the switch in a reasonably safe condition, having regard to the safety of its employes." *held*, not objectionable as fixing, as a matter of law, the degree of order or repair that such a switch should be kept in to be reasonably safe for the use intended.

5. ——: ——: ——: ——. The plaintiff's petition charged defendant with negligence in rapidly running its cars over the deceased "after it was known by those in charge of the train that he was injured, *and* in a dangerous situation." The court instructed the jury that they would be warranted in finding the defendant negligent if they found that its cars were run over the deceased after those in charge knew that "either the said Brooke was injured *or* was in a dangerous situation." *Held*, that the instruction was proper, and that it was supported by evidence that after the engineer saw the lamp carried by deceased go over his head, and supposed he had fallen, and that there was trouble, the engine went over the deceased twice, and a stock car once. Whether the fatal result was caused by the first or second movement of the train, *held*, immaterial.

6. ——: ——: ——: PRACTICE IN SUPREME COURT. Where the correctness of appellant's abstract is denied by an additional abstract filed by appellee, and an amended abstract subsequently filed by the appellant makes no denial of appellee's abstract, the supreme court will not look to the transcript to determine the matter, but will accept the statement of appellee's abstract as true.

7. ——: ——: ——: WAIVER: INSTRUCTION. The plaintiff charged defendant with various acts of negligence, which defendant alleged had been waived by the deceased. No evidence of plaintiff's allegations was introduced, and the court in its instructions withdrew the same from the jury. *Held*, that under the circumstances the question of waiver was properly withheld from the jury.

Appeal from Jasper District Court.—HON. D. RYAN, Judge.

WEDNESDAY, OCTOBER 29, 1890.

ACTION for personal injury. There was a judgment for plaintiff, from which the defendant appealed.

T. S. Wright and *Winslow & Varnum*, for appellant.

Philips & Day and *Kerr & McElroy*, for appellee.

GRANGER, J.—Plaintiff's intestate, O. H. Brooke, was a brakeman in the employ of the defendant. On the seventh of December, 1887, at Colfax, in this state, while in the discharge of his duties, he was injured by defendant's train, and soon after died, as a result of such injuries. The train, on which Brooke was a brakeman about dark, pulled into the station at Colfax. The train was cut, and the engine and five cars pulled to the west, for the purpose of placing four of the cars on a sidetrack. The fireman was in charge of the engine, and Brooke and one Wilson were brakemen on the train, and were on the part that went forward. There were two switches on the main line, known in the record as the "east" and the "west" switch. The course of the train that night was west, and, to set the cars out on the north sidetrack, the east switch was to be used, and Brooke, being the front brakeman, was to, and did, open the switch, and the four cars were "kicked" in onto the sidetrack. To do this, the detached part of the train moved west until the rear car had cleared the east switch which Brooke opened, and signaled the fireman (Robinson) to back, which was done, and Brooke advanced west to a point near the west switch, and while the train was moving backward, and onto the sidetrack, he stepped between the first and second cars from the engine, and pulled the coupling-pin, which detached the four cars designed for the sidetrack. The signals given by Brooke were with his lamp, and, after pulling the pin, the fireman observed his lamp go over his head, and, taking it for granted he had fallen, he stopped the train,—that is, the engine and one car,—and Brooke was found lying with his head to the north, and both limbs crushed, one at the ankle, and the other midway between the ankle and knee. The specific grounds of negligence of which the plaintiff complains on this trial are: *First*, the construction and condition of the west switch where the injury occurred; and, *second*, the operation of the train in such manner that the engine and car or some part of it

passed over Brooke after he fell, and his situation as to danger was or should have been known.

I. The switch in question is what is known as a "split switch," and as to such switch, and the place of the injury, the jury made the following special findings in answer to the questions submitted: "*Q. 11.* How far east of the west switch was the deceased when he was injured? *A.* About eight feet.

1. RAILROADS: construction of switch: negligence: personal injury.

"*Q. 15.* Was it negligence on the part of the defendant to use a split switch near the place where the plaintiff's intestate was injured? *A.* No.

"*Q. 24.* Was the switch at and near the place where the accident occurred constructed as such switches are usually constructed? *A.* No.

"*Q. 25.* Was this switch out of repair? If so, in what respect? *A.* Yes; too much space between the split rail and the stationary rail."

We proceed then with the fact established that there was no negligence in the kiud of switch used. The negligence then with which we have to do, if any, is in the construction of the switch, and the condition it was in at the time of the injury, and, at the outset, we should be careful to avoid any misapprehension as to the terms used; and it has seemed to us that, in argument, the word "construction" has not been understood in the sense intended by the finding of the jury. The theory upon which it is claimed that the injury resulted from the switch is that after the pin was pulled by Brooke, in his attempt to pass out from the train, his foot caught between what is called the "split rail" and the stationary rail, and so held him that he fell, and his legs were crushed by the moving train. Now, our understanding of the finding of the jury is that a split switch, when properly adjusted or placed, is a reasonably safe one, but that the one in question was not so placed or adjusted. A description of the switch may aid us somewhat to know if the jury, under the evidence, could properly so find; for a position of appellant is that the record is a conclusive showing against negligence in

the construction of the switch. One Howard North was an employe in the office of defendant's road-master, and being familiar with such switches, and the one in question, gives a description; and we will use his description as given in his testimony. It may be well to first say that a split switch is made by the use of two split rails between the stationary rails that make the track, the split rails being chamfered off on the side of each, next to the stationary rail, these split rails being held in position by iron cross-bars fastened to the flange or base of the rails, so that, by one movement of the switch rod, both rails were moved, and the switch opened or shut as may be desired. One of the switch rails must at all times constitute a part of an open track; the other being a part of a track not open for use. The heel of the switch or switch rail is the end made stationary, and connected with the line of other rails which constitute the track. The point of the switch or switch rail is the chamfered end, and movable by the switch rod. The point of the switch in question is to the west; and we now look to the description given by Mr. North:

"About five feet from the west end of the switch rail, it commences to be lessened, and is diminished in size until it reaches a sharp or thin point at the west end, and if so pressed down or lessened as that, when it is thrown back against the stationary rail, it closes tight to it. The switch rail has a hollow cut in it, on the side next to the stationary rail, so that the ball of the main rail will fit into the hollow. When the switch is thrown back against the rail, it stands with a feather edge, and for a distance of about five feet, when it assumes the shape of the rail. The ball of the switch rail is cut down so that it does not bear any weight of the train at first and then, as it gets along about five feet from the west end of the rail, it takes the whole weight of the train,—probably before that. It rises a little above the opposite rail, just enough to bear the weight of the train, and this carries it off onto the switch. When the switch is thrown off from the main track, the point of the switch will be a little less than six inches south of the stationary

rail. * * * If the switch were thrown open so as to let the train pass upon the main track, the switch rail and the main rail would be about two inches and three-quarters apart at the nearest point in the middle, or near the middle, of that switch, at the nearest point of juxtaposition, assuming that they were five inches apart at the ends. It would extend as far back as they could put it in,—wherever there is any danger of the foot getting in, and just as far back as they could, without making it meet one another, so that the rails would come together when the switch is thrown up. There is no blocking at the other end,—the point of the switch rail. *There could not be.* The blocking would extend back six or eight feet, *ranging according to the curve of the switch.* If you had a curve that would bring your frog within thirty-two feet of the switch, then the block would have to go a good deal further back; the hinge of the switch would be further from the stationary rail."

The element of danger in these switches is the V shape, caused by the convergence of the split rail and stationary rail, and in such proximity that a person's foot may become wedged between them; and this is appellee's theory of how Brooke was injured. It is conceded that, at the point where the injury occurred in this case, the danger could not be avoided by blocking, as is done at other parts of the switch. The theory upon which the danger is said to be avoidable is by placing the split rail and the stationary rail so near together or so far apart as not to admit of the foot being caught. The jury in this case has found that the space between the rails was too much, and the testimony quite clearly shows that near where Brooke fell a man's boot could be caught between the rails. It clearly appears, by experiment, that, from about five to six feet east of the point of the switch, a person's foot would become fast, and that, seven and one-half feet from the point, it could not be removed. It should be in mind that, when the accident occurred, the switch was set for the main track, and that the switch rail on the north side (where Brooke was) was not against the

main rail, but away from it; and the testimony shows that the point of the switch rail was five or six inches from the main rail, and that the distance gradually decreased to a point seven and one-half feet east, where the distance was about three and three-fourth inches. At that point the foot became fast, but it was by putting the foot between the rails, where the space was wider, and sliding it forward under what is called the "ball of the rail." It would then seem that if these rails, at the point where the foot would enter, had been no more than three to three and one-half inches apart, the danger would, at least to some extent, have been avoided. Now, could the switch have been so constructed, consistent with its proper use, or could the rails have been enough further apart to have avoided the danger of persons being thus caught? The record is such as to satisfy us that, other than at the point of the switch, the rails could be within two and one-half inches, or less, consistent with the operation of the train. In fact, the testimony of North, based on the theory of the distance at that point being five inches, fixes the distance seven and one-half feet east of the point at two and three-fourth inches, and in this respect he differs from the witness Kerr as to such distance some three-fourths of an inch or more. We must, of course, assume that state of facts having support in the testimony, consistent with the finding of the jury. If the space at the point of the rail should be five inches, of course, for the five or six feet in which the rail is chamfered, the space must lessen gradually, but the distance must be comparatively short till the space would be too narrow to admit the foot. We are not to fix the distance apart that such rails should be to constitute due care, and we only inquire if the record is such that the fact of negligence could legally be found. It is of course obvious that with the switch rail closed up, and its point in contact with the main rail, and the two gradually diverging, there must be a point where a foot might be thus caught; but it would seem that by widening or narrowing the space between the split rail and

the main rail, when not in contact, the situation might be so as to avoid such danger. If that could be, and had been, Brooke could not have been injured as appellee claims, and as the jury must have found he was. Nothing in the record or in argument enables us to say, as a matter of law, that the jury could not have found that the construction of the switch was defective. Conceding that some such place of danger must be, if trains are to be operated, it is reasonable to say the number should be reduced as much as practicable, and where it can be done, and is not, the question of whether or not the failure amounts to negligence is generally one of fact for the jury.

II. Objections are made to the testimony of Mr. Kerr for the plaintiff. He is one of the attorneys for plaintiff, and is the witness who made the measurements at different points. The objection to the testimony is that the measurements were made nearly fourteen months after the accident, without proof that the conditions were the same. One J. M. Stamer was a witness for plaintiff, and testified that he had been the station agent for defendant at Colfax for fourteen or fifteen years, and up to the time of giving his testimony, and that he knew of no change having been made. It is true, we think, that a change in the switch might have been made, and he not know of it, but considering his relation to the road at that point, and the fact that he had no knowledge of a change, with the silence of defendant in that respect, we think it was not error for the court to admit the testimony of Kerr. The facts as to any change being so clearly within the knowledge of the defendant, and after such testimony by its agent in charge of the station at that point, if there had been a change, we think the defendant should not have remained passive, but have shown the fact. Such a rule is in the interest of a safe and proper disposition of causes.

2. ——: ——: ——: evidence.

It is also urged that the testimony of Kerr, as to the experiments in placing his foot between the rails, showing where the foot would be caught, and where not,

was erroneously admitted. We regard it as clearly competent. A very important fact to be known was whether, with the situation of the rails, a foot could or would be likely to be caught. We can hardly imagine testimony that would better show the fact than such experiments. The shoe that Brooke wore was before the jury, and the witness who made the experiment was there, and the relative size of the shoes worn by each could be known. The case of *Klanowski v. Grand Trunk Ry. Co.*, 31 N. W. Rep. 275, is cited as authority against the admission of such evidence. The force of the holding in that case is much lessened, because of a divided court, and then the facts are so dissimilar that, if an unquestioned rule, it would not be controlling No case to which we are cited is authority against the action of the district court in admitting the testimony.

3. THE same.

III. It is said there is no testimony to support a finding that Brooke caught his foot between the rails and fell, any more than there is that he stumbled over the rails in passing out from between the cars. It is true there is no direct testimony to show the fact. No one saw his foot between the rails, and he was the only person to know the facts. But, in legal proceedings, such facts are found from surrounding circumstances. It is true that Brooke fell and was injured near the point where the condition of the switch was such that a foot might be caught. The shoe worn by Brooke was in evidence, and was before us, and bore some indications of the foot having been caught. The shoe presented a wrenched appearance. The train being in motion, he must have moved with it along the track, and in the direction for his foot to become wedged in or caught. We do not regard it as conclusive that the foot could not have been caught, because it was not so when he was first found. It is easy to understand that the foot might have been released by falling, or by the wheels passing over the limbs. Much in this respect would depend upon how firmly the foot was caught or wedged between the rails.

From our examination of the record, we incline more to the view that the injury resulted from the foot being caught, than by merely stumbling over the rails. We think it would be difficult for a disinterested person to read the record without such a conviction It was, however, to our minds clearly a question of fact for the jury, and upon evidence sufficient to sustain the finding.

IV. The seventh instruction is as follows: "If you find from the evidence that defendant is not guilty of negligence in selecting the class of switch which in this case has been denominated the 'split switch,' but was in the exercise of ordinary care in selecting such switch, then you may further pursue the inquiry, and determine whether or not the switch was properly constructed; that is to say, whether it was in perfect order or repair. The defendant was bound to exercise ordinary care in keeping the switch in a reasonably safe condition, having regard to the safety of its employes engaged in performing their duties for the defendant. It does not follow, because of the fact that the switch, at the time of the alleged injury, was out of repair, if such is the fact proved, that the defendant was guilty of negligence. The rule is, if the switch and guard rails were properly constructed originally, and by use or otherwise were out of repair, then the defendant would not be liable unless it appeared that it had knowledge of such defects, or that such a length of time had elapsed after such defect that, by the exercise of ordinary care and prudence, it would be presumed to know of such defect. If, however, in its original construction, the switch was not properly constructed, or if the guard rails were not properly constructed,—if it appear that this defective construction caused the injury,—then no lapse of time to bring this defect to the defendant's knowledge is required." The complaint is that the instruction permits the jury to inquire whether or not the switch was in *perfect order or repair*. Just the degree of order or

4. —: —: —: instructions to jury.

repair that such a switch should be kept in to be reasonably safe for the use intended is not fixed as a matter of law, and, if the jury had been told that the company was required to keep the switch in perfect order or repair, it would have been error, because the effect would have been to determine that perfect order or repair would be essential to a reasonably safe condition; but the jury is not so told, and, when the instruction is fairly considered, there is little room to doubt the meaning of the court. The tenor of the instructions throughout, barring the particular words referred to, convey the idea of only reasonable care and safety as the rule. The objectionable language is immediately followed by these words: "The defendant was bound to exercise ordinary care in keeping the switch in a reasonably safe condition, having regard to the safety of its employes engaged in the performance of their duties." A reasonably safe condition might require "perfect order or repair," or something less, and on the whole, while the jury is told that it may inquire whether or not the switch was in perfect order or repair, it is not told that such a degree is essential, but is told, in quite specific language, the degree of order or repair in which it must be kept by defendant to avoid liability, and is so told in immediate connection with the words complained of. The court in the instruction seems to have distinguished between or called attention of the jury to two acts as to which there might be negligence: *First*, selecting the kind or class of switch, and, *second*, the construction; and the latter embraces the putting or having it in proper order or repair. The jury find for defendant as to the selection, and for the plaintiff as to the order or repair, by saying that it was not constructed as such switches usually are, because of too much space between the rails. When the findings and the instructions are both considered, there is little room to doubt that the instruction was properly understood.

V. The petition in charging the acts of negligence by defendant used this language: "And said defendant

5. THE same.

was further guilty of negligence in operating its trains at a rapid rate of speed, while plaintiff was required and commanded to make the coupling of its cars in its train, and in running its cars over said Oliver H. Brooke, after it was known by those in charge of the train that he was injured, and in a dangerous situation." The court in its eighth instruction told the jury: "If you find from the evidence that the engineer in charge of the train, after he knew that either the said Brooke was injured or was in a dangerous situation, moved the cars so that they ran over the deceased, and that, by the exercise of ordinary care or prudence, he could have avoided so running over him, then this would amount to negligence on the part of defendant." It will be observed that the instruction holds to a rule for negligently running over Brooke after knowing he was injured *or* in danger, while the averment is that the negligent act was done after knowing he was injured *and* in danger. The rule given by the court is right. The legal gist of the averment is that, after the parties in charge knew that the situation of Brooke was such that the train should be stopped, they negligently ran over him, and such construction was the necessary guide to the introduction of evidence. The intention of the pleader was too manifest to be misleading to the defendant. The rule that words, mere surplusage, should be disregarded, and need not be proved, is extended even to criminal pleadings and procedure.

It is urged that there is no evidence of a failure to exercise due care to stop. There certainly is evidence showing that, after the engineer saw the lamp go over Brooke's head, he supposed he had fallen; that there was trouble, and that he should stop. It is also quite apparent that the engine passed over Brooke twice, and the stock-car once. There is evidence from which it might be found that the engine passed over him the second time, because the power was put on for the engine to go forward after it had passed over him going

backward. Certainly there is evidence to justify the instruction.

It is also said: "There is no evidence that, by any movement of the cars after the deceased was injured, the fatal result was caused." This action is to recover for the injuries resulting in death, whether by negligence in one or both particulars. That he was killed by the operation of the train admits of no doubt. The jury must have found that death resulted from a negligent act. If the first passage of the train was fatal, and appellant says there is no evidence that it was not, then it is entirely immaterial as to the other. If not, then death resulted from the latter. The evidence as to the knowledge of injury or danger was before the train had passed either way. There is evidence upon which to predicate negligence in killing Brooke by the passage of the train over him either way, and we thus meet the query whether, before plaintiff is entitled to a submission of her cause as to negligence in passing over Brooke the second time, there must be evidence showing the effect of passing over him the first time. The claim for such a rule is not supported by authority, and is not in harmony with our practice. If the death was the result of negligence, it is not a matter of vital importance that the particular act should be known. If defendant desired to know the particular fact upon which the verdict was based, with a view to overcome presumptions in favor of the verdict, its recourse was to special findings.

6. —: —: —: practice in supreme court.

VI. Appellant presents several pages of an abstract purporting to be copied from a railroad gazette, and urges that it was improperly admitted in evidence. Appellee files an additional abstract, denying that the article was ever offered, or in any manner used, in evidence. Appellant files an amendment to its abstract, but makes no denial of appellee's abstract; hence, we take the statement in appellee's abstract as correct. Appellant claims that the transcript sustains its position, but we do not go to the transcript unless appellee's abstract is denied.

White v. Savery, 49 Iowa, 197; *Kearney v. Ferguson*, 50 Iowa, 72.

VII. Plaintiff pleaded certain other acts of negligence by the defendant, as that the cars were not provided with proper handholds, coupling-pins, etc., and that the train was operated at too high a rate of speed. Defendant, in its answer, pleaded a waiver of these defects by plaintiff's intestate. The court in its instruction told the jury that these allegations by plaintiff had no evidence to sustain them, and withdrew them from its consideration. Appellant insists that it was error not to submit the question as to waiver. Appellant cites some authorities bearing on questions of waiver when properly in issue, but none applicable to such a state of facts; nor does counsel assume to argue the effects of the court's action. Comment is unnecessary.

7. ——: ——: ——: waiver: instruction.

There are no other questions important to be considered, and the judgment below is AFFIRMED.

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HERMAN BEYER, Appellant, v. MARGARET THOEMING, Appellee.

1. **Homestead:** LIMITS OF EXEMPTION. A homestead of between four and five acres of land will not be rendered liable to execution because of its lying partly within the limits of a city, if not a part of a city plat.

2. ——: CONVEYANCE TO WIFE: CREDITORS. A judgment is not a lien upon the homestead of the judgment debtor, and the latter's conveyance of such property to his wife will not be deemed fraudulent as to the judgment creditor.

Appeal from Scott District Court.—HON. C. M. WATERMAN, Judge.

WEDNESDAY, OCTOBER 29, 1890.

THIS is an action in equity by which it is sought to subject certain real estate to the payment of a judgment

against Charles Thoeming, the husband of defendant. There was a trial upon the merits, and a decree for the defendant. The plaintiff appeals.

D. B. Nash and *J. F. Atwill*, for appellant.

Ernst Claussen, for appellee.

ROTHROCK, C. J.—I. The land in controversy consists of four and sixty-three-hundredths acres lying partly within and partly without the corporate limits of the city of Davenport. That part within the limits is not platted into town lots, streets or alleys, and does not abut on any street of the city. The land is in one body, and is used for agricultural purposes, excepting a small part upon which is situated a dwelling-house, with appurtenant buildings and yards. The defendant and her husband took up their residence on the land more than seventeen years ago, and it is claimed to be their homestead. That it has been their homestead cannot be disputed. The fact that part of the land is within the city limits does not limit the extent of the homestead, because no part of it is within the city plat. *McDaniel v. Mace*, 47 Iowa, 509.

1. HOMESTEAD: limits of exemption.

II. The legal title to the land was in the defendant's husband, and while it was occupied as a homestead by the defendant and her husband, and on the twenty-sixth day of May, 1886, the plaintiff recovered a judgment in the Scott district court, against the husband. On the same day Thoeming conveyed the property to the defendant. The plaintiff commenced this action to subject the land to the payment of the judgment. The defendant and her husband failed to appear to the action, and a decree was entered against them by default. Upon motion of the defendant, the decree as to her was set aside, and she filed an answer setting up her homestead right, and that the said judgment never was a lien upon the premises by reason of the homestead character of the same. The foregoing are the material facts in the case.

2. ——: conveyance to wife: creditors.

There is no dispute that, when the judgment was rendered, and when the debt upon which it was founded was contracted, the land was the homestead of the defendant and her husband. Under this state of facts the judgment was no lien upon the property, and it never became a lien. The defendant's husband could not defraud his creditors by conveying it to his wife, nor to any other person, for the very good reason that his creditors had no right to subject it to the payment of any debts contracted after the homestead right attached. *Delashmut v. Trau*, 44 Iowa, 613; *Officer v. Evans*, 48 Iowa, 557; *Aultman v. Heiney*, 59 Iowa, 654; *Butler v. Nelson*, 72 Iowa, 732. Counsel for appellant appear to be of the opinion that the defendant was in some way precluded from asserting the homestead right because the default was not set aside as to her husband. The setting aside of the default as to the defendant operated to restore to her any right of which she may have been temporarily deprived by reason of the default. Besides, under the rule of the above cases, if the land was a homestead, she had the right to take the conveyance, even if she had been a stranger. AFFIRMED.

MARY J. JUDGE, Appellee, v. JOHN JORDAN *et al.*, Appellants.

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1. **Intoxicating Liquors**: SALES CONTRARY TO LAW: DAMAGES: EVIDENCE: VERDICT. The credibility of the testimony of a witness is for the jury to determine, and its verdict will not be set aside, because the testimony whereon it is based is apparently in conflict with that given by the witness upon another trial.

2. ———: ———: ———: ———: ADMISSIONS: INSTRUCTIONS TO JURY. Facts testified to by a party to a cause against his interest, if unquestioned, have the force of an admission as against the party so testifying, and the jury may be so instructed.

3. ———: ———: ———: INSTRUCTIONS. In an action by a married woman against a saloon keeper for damages on account of the sale of intoxicating liquors to her husband, proof of having furnished intoxicating liquors to the husband upon the order and promise of payment by a third person is sufficient to sustain the action.

4. ——— : ——— : ——— : ———. Instructions requested by a party to a cause not pertinent to the issues, or with reference to questions upon which no evidence was introduced upon the trial, should be refused.

5. ——— : ——— : ——— : ———. An instruction to a jury, that if they found that a witness had testified falsely as to material matters knowingly and intentionally, they *might* disregard his testimony altogether, is not erroneous.

6. ——— : ——— : ———: VERDICT : PRACTICE. The jury were directed by the court that in the event of their finding a verdict against the defendant Jordan, they should answer a certain interrogatory submitted with the instructions, and return same with their general verdict. The jury returned a verdict against Jordan without answering the interrogatory. After the verdict had been marked filed, and had been read by the court, the court returned it to the jury with the verbal direction that they "retire and consider further of their verdict, and return a verdict with answer to the special interrogatory submitted in the charge of the court." *Held*, that the action of the court was proper, and that defendants were not prejudiced thereby.

7. ——— : ——— : ——— : HUSBAND AND WIFE : DECLARATIONS. In an action by a married woman proof of the declarations of her husband, alleged to have been made while acting as the agent of the wife, are not admissible in evidence against the wife in the absence of proof of such agency.

Appeal from Clinton District Court.—HON. A. HOWAT, Judge.

WEDNESDAY, OCTOBER 29, 1890.

PLAINTIFF, for cause of action against the defendant Jordan, alleges that on the second day of January, 1887, at the "Elkhorn saloon, kept by said Jordan, in the city of Lyons, said Jordan sold intoxicating liquors to the plaintiff's husband, Michael H. Judge, contrary to law, thereby causing her husband to become intoxicated in consequence of which she has been injured in her means of support, and put to expense for medicines, and medical and surgical treatment of her husband." Plaintiff alleges that the property, wherein the saloon was kept and the liquors sold, was the property of defendant, Patrick O'Conner, and was used by Jordan

for said unlawful business, with the knowledge of the defendant O'Conner. The defendant Jordan answered denying generally, and defendant O'Conner answered admitting that he was the owner of the premises described, and denying any knowledge as to the other allegations of the petition. Trial to a jury, and verdict and judgment for plaintiff. The defendants appeal.

W. C. Grohe and *Ellis & McCoy*, for appellants.

J. S. Darling and *J. H. Flint*, for appellee.

GIVEN, J.—I. A brief statement of the undisputed facts is necessary to an understanding of the questions discussed. On and for some time prior to January 2, 1887, the defendant Jordan kept a saloon known as "The Elkhorn," in the premises described, under a lease from defendant O'Conner. On Sunday, January 2, 1887, a fire broke out in a building near the saloon belonging to Mr. Gage. During the fire, the saloon was kept open and warm, and resorted to by many persons to warm themselves, the day being exceedingly cold; and some property taken from the burning building was deposited in the saloon. Mr. Gage said to defendant Jordan: "Give the fire department a round on me. I will pay for it." Jordan and his bartender dealt out intoxicating liquors, for which Mr. Gage afterwards paid. Plaintiff's husband was at his home when the alarm of fire was given, and proceeded at once to the burning building, where, in common with many other citizens, he assisted in removing property from the burning building. While so engaged, he took a drink from a bottle of whiskey that was passed among the men at a ladder at the building. In the evening, plaintiff's husband was found lying in an alley so intoxicated as to be unable to help himself. He was carried by the police to the city lock-up, put in a bunk, and a fire built in the stove. An officer visited the lock-up about nine and half past two in the night, and on the last visit a

1. INTOXICATING liquors: sales contrary to law: damages: evidence: verdict.

physician was called, who, finding the patient unconscious, and the prison very cold, ordered him removed to a boarding-house near by. Plaintiff's husband was so badly frozen as to totally disable him, and to require treatment for many months, and to necessitate the amputation of one of his legs. He was then aged twenty-eight years, and, prior to these injuries, was an able-bodied man, and able to earn from one dollar and fifty cents to one dollar and seventy-five cents per day in his business as a laborer. There is a conflict in the testimony as to whether plaintiff's husband got any intoxicating liquors from defendant Jordan, or at his saloon, and whether the defendant O'Conner knew that Jordan was selling intoxicating liquors, contrary to law, on the leased premises.

Following the order of the arguments, we first notice appellants' complaint that the court erred in overruling the motion to set aside the verdict, and in rendering judgment thereon, because the verdict was not sustained by the evidence. Augustus Hurlburt testified that during the fire he and Mr. Judge went into Jordan's saloon with others, and that he and Judge drank whiskey there out of the same bottle; that neither of them paid for it; and that Jordan and his bartender were there at the time. Hurlburt's testimony, as given on a former trial of this plaintiff against one Boock, to recover for injuries caused by the same intoxication, is in evidence, and is claimed to be in direct contradiction of that given on this trial, and that Hurlburt is not, therefore, entitled to credit. On the former examination, he testified to Judge's drinking out of the bottle at the ladder, and to his drinking in Boock's saloon. He was not asked as to his drinking in Jordan's, and the only statement made in conflict with his testimony in this case is, that he did not see Judge take more than those two drinks. It was for the jury to say what credit, if any, should be given to Hurlburt's testimony, and we think, in view of the corroborating circumstances, that they were warranted in accepting it as true. Under the order from Gage, liquors were dealt out freely by Jordan on that

occasion. True, he says only to the firemen, but the jury might well have found that both Gage and Jordan meant by "firemen" those who were engaged in trying to save Mr. Gage's property. The circumstances were certainly corroborative of the testimony, which, thus corroborated, so far sustains the verdict as that it should not be interfered with.

II. The court says in its instructions: "It is admitted by defendant Jordan that at the time of the fire one James P. Gage said to him to give the firemen a round, and he would pay for it; and it is further admitted by said Jordan that, upon said direction of said Gage, he did, in his saloon, furnish the firemen intoxicating liquors, for which said Gage subsequently paid him." Appellants concede that Jordan so testified, but contend that it was not an admission, because not stated in the pleadings. These statements of Jordan's in his testimony are not questioned, and it was not error to say to the jury that they were admitted by Jordan.

2. —: —: —: —: admissions: instructions to jury.

III. Based upon these admissions, the court charged the jury that, if Jordan or his bartender, acting upon the direction of Gage, furnished Judge intoxicating liquors, "or furnished it to others in his saloon, from whom the plaintiff's husband obtained it, then it was a selling to said Gage and the plaintiff's husband, substantially as alleged in plaintiff's petition." Appellants suppose a case where A sold to B, and B subsequently, upon his own account, sold to C, and contend that A is not liable for the sale to C. Such is not this case. It was submitted to the jury upon the theory that defendant was liable, if, upon the order of Gage, he furnished intoxicating liquors to plaintiff's husband. The instruction states the law correctly, as applied to the issues in this case.

3. —: —: —: instructions.

IV. Appellants asked an instruction to the effect that there was no testimony tending to show that the liquors which Judge drank from the bottle at the ladder or elsewhere out of Jordan's saloon were furnished by Jordan, and complains of the

4. THE same.

refusal to give this instruction. The court so instructed the jury as to the liquors drank from a bottle at the ladder. The only other drink that Judge was shown to have taken outside of Jordan's saloon was at Boock's, and there was no pretense that it was furnished by Jordan. If there was any error, it was in instructing that there was no evidence tending to show that the bottle of liquor was furnished by Jordan. The order of Gage, and Jordan's acting upon it, and the fact that the bottle of liquor was taken to the place of the fire, and drank by men engaged in removing property and extinguishing the fire, surely had such a tendency; but, if the giving of this instruction was error, it was without prejudice to appellants. Other instructions refused were to the effect that, if Judge helped himself to Jordan's liquors without Jordan's knowledge, or if he got the liquor by appearing in the guise of a fireman, that would not constitute a sale as charged. There was no testimony calling for such instructions, and, therefore, no error in refusing them.

V. In instructing the jury as to the rules for determining the credibility of witnesses, they were told that if they found that a witness had testified falsely as to material matters, knowingly and intentionally, they *might* disregard his testimony altogether. Appellants contend that they should have been instructed that in such case the testimony *must* be disregarded in all matters, unless corroborated. The testimony is left with the jury, and it is for the jury to say what credit and weight, if any, shall be given to it. If, by reason of his having intentionally testified falsely as to one material matter, they believe him unworthy of credit as to all other matters, they should disregard the entire testimony; but if they believe any part of his testimony to be true, though not corroborated, it is their privilege to accept it. To say that in such case they must disregard the entire testimony would be to direct the jury to disregard testimony which they believe to be true. We think the instruction announces the

5. THE same.

correct rule. Whart. Crim. Ev., sec 380; *State v. Wells*, 46 Iowa, 662.

VI. The jury were directed, in the event they found for the plaintiff against the defendant Jordan, to answer the following interrogatory: "Did the defendant O'Conner have knowledge on or before the second day of January, 1887, that said Jordan was keeping for sale or selling intoxicating liquors in the saloon occupied by him?" The jury returned into court with a verdict in favor of the plaintiff for fifteen hundred dollars, but without any answer to the interrogatory. The verdict was marked "Filed" by the clerk, and passed to and read by the court; and thereupon the court returned the verdict to the jury, and directed them "to retire and consider further of their verdict, and return a verdict with answer to the special interrogatory submitted in the charge of the court." Thereafter the jury returned into court the same verdict, and an affirmative answer to the interrogatory. Appellants complain of the refusal of the court to record the verdict as first returned, and of the court's charging the jury verbally to consider further of their verdict, and of the recording the verdict last returned. *Rowell v. Williams*, 29 Iowa, 210, is relied upon by appellants. That was an action against three defendants to recover damages on account of personal injuries. The jury returned a verdict of seven hundred dollars against one defendant (the city), and five hundred dollars against each of the other defendants. The court said to them that they could not thus divide upon their verdict, but must find a gross sum against all of the defendants, or in favor of all. The second verdict returned was against the defendant city alone for eight hundred dollars, one hundred dollars of which was remitted. This court held "the verdict, since the entry of *remittitur*, is precisely as it was and would have been but for the action of the court in directing the jury to bring in a new or amended verdict. The city cannot complain that plaintiff lost the benefit of the one

6. —: —: —: verdict: practice.

hundred dollars against the other defendants, for it is just what was first assessed, and not a cent more. Suppose there was a technical error, there was no possible prejudice." The same can be said in this case. Appellants cannot complain, for they pay just what was first assessed, and not a cent more. There was no error in requiring the jury to answer the interrogatory before receiving and recording their verdict.

VII. Appellants, having shown that plaintiff's husband was examined as a witness upon the trial of the case against Boock, offered to prove what he testified to as to having got liquor on the day of the fire at Jordan's saloon. Appellee objected as immaterial, irrelevant and incompetent, and the objection was sustained. Appellants claimed this testimony to be admissible, on the grounds that the husband was in some sense acting as agent of his wife. They fail to point out, and we to observe, wherein the relation of principal and agent existed in the transaction under consideration. He was not acting for her in procuring the liquors and becoming intoxicated. If it be true, as stated, that she called him as a witness in the former trial, that did not obligate her to call him in this, nor commit her to the statements in his former testimony. It is a matter of common observation that husbands are not always favorable to the prosecution of cases like this by their wives. The testimony offered was incompetent, and, therefore, properly excluded. There was no error in admitting the testimony tending to show that defendant furnished liquors to the firemen. It was for the jury to say who were included as firemen, and whether, in so directing, Gage did not have in mind all who were assisting in the preservation of his property, and whether Jordan did not so understand it.

7. —: —: —: husband and wife: declarations.

There was no error in excluding the testimony offered by defendants as to the purpose for which the saloon was open during the fire. That it was open does not create any liability; nor is it any defense that it was open for the purpose of placing goods therein from the

burning building, or permitting the citizens engaged in suppressing the fire to go there and warm themselves.

We have examined the entire record with reference to the numerous assignments of errors with care, and reach the conclusion that the judgment of the district court should be AFFIRMED.

CHARLES GOETZMAN, Appellant, v. J. R. WHITAKER, Appellant, AND COUNTY OF BOONE, Appellee.

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1. **Parties to Actions**: CERTIORARI: INTERVENTION: PRACTICE. In a proceeding by *certiorari*, commenced by a resident taxpayer of a county, to test the validity of the action of the board of supervisors, whereby the salary of the county attorney was increased, the county attorney is a necessary party, and his admission to plead as a party defendant even after the determination of the cause will not be regarded as an abuse of discretion on the part of the trial court.

2. **Acts of Public Officers**: REVIEW: CERTIORARI. A resident taxpayer of a county may maintain a proceeding by *certiorari* for the review of any action of the board of supervisors whereby the amount of his taxes may be increased.

3. **Salary of County Attorney**: WHEN DETERMINED: CHANGE DURING TERM: VALIDITY. The salary of a county attorney having been determined by the board of supervisors under the provisions of Acts, Twenty-first General Assembly, chapter 73, section 11, cannot thereafter be either increased or diminished during his term of office, even though such determination may have been made under a misapprehension of the law as to such officer's right to fees in criminal cases.

Appeal from Boone District Court.—HON. S. M. WEAVER, Judge.

WEDNESDAY, OCTOBER 29, 1890.

PROCEEDING by *certiorari* to test the validity of certain acts of the board of supervisors of Boone county. The facts are stated in the opinion.

E. L. Green, for appellant, J. R. Whitaker.

Crooks & Jordan, for appellant, Charles Goetzman.

O. M. Brockett, County Attorney, for appellee, Boone county.

ROBINSON, J.—Plaintiff is a resident and taxpayer of Boone county. The defendants in the proceeding as it was commenced are Boone county, the auditor and the members of the board of supervisors of Boone county. The appellant Whitaker was permitted to intervene as a party defendant before final judgment was rendered. The petition alleges that the board of supervisors of Boone county, at the June session of 1886, adopted the following: "Resolved by the board of supervisors of Boone county, Iowa, that the salary of the county attorney hereafter to be elected, as provided by the act of the Twenty-first General Assembly, be and the same is hereby fixed at four hundred dollars per annum;" that J. R. Whitaker was duly elected county attorney of Boone county at the general election of the year 1886, and qualified and entered upon the discharge of the duties of the office on the fourth day of January, 1887; that on the eleventh day of April, 1887, the board of supervisors adopted the following: "It being manifest to the board that a mistake was made at its June session, 1886, in naming the county attorney's salary, said board being at that session wrongly informed that said officers would receive fees in criminal cases, and it being undisputed that the salary was named on that basis, it is, therefore, ordered that the further sum of four hundred dollars per annum be added to the amount named at said June session, for the purpose of rectifying the mistake then made;" and that defendants have issued warrants to Whitaker under the resolution last quoted for his salary at the rate of eight hundred dollars per annum. The petition further alleges that the action of April 11 was illegal, and asks that defendants be required to certify to the clerk of

the court a correct transcript of the orders and resolutions of the board of supervisors in relation to fixing the salary in question; that the county auditor be required to show the amount of warrants issued to Whitaker on account of his official salary since January 1, 1887; that the action taken April 11 be reviewed and set aside; and that such further order be made as is right and proper. A writ was issued as prayed, and a return made thereto by the county auditor. The return shows that the action of the board at their meetings in June, 1886, and April, 1887, was as stated in the petition, and that Whitaker was paid one thousand dollars on account of his salary for the first five quarters of his official term. The fourth paragraph of the return is as follows: "*Fourth.* It is further certified and returned as a fact that the salary of the county attorney was at said June session, 1886, intended to be fixed, and intended to be recorded, at eight hundred dollars; but, by mistake, four hundred dollars was deducted from said amount, and the salary was made at four hundred dollars, and the record of said April session was made and entered relative to and in correction of such record of said board at its June session, 1886." The plaintiff moved for judgment on the return; and on the twenty-third day of November, 1888, the motion was taken under advisement to be determined in vacation. On the eleventh day of January, 1889, in vacation, the judge of the court filed his findings to the effect that there should be a judgment of the court declaring the action of the board taken April 11, 1887, to be null and void, and for costs, and giving counsel permission to prepare a form of judgment entry in accordance with the findings. Four days after the findings were filed, and before judgment was rendered, Whitaker filed his application to be made a party defendant, supported by an affidavit showing that he was entitled to the salary allowed the county attorney, and that he was, therefore, interested in the order of the board, which plaintiff was seeking to have set aside.

On the twenty-eighth day of January, 1889, Whitaker filed a motion to set aside the submission made at the preceding November term for the purpose of allowing him to be made a party defendant. At the January term, 1889, to-wit, on the fifteenth day of February, the court set aside the submission, and granted the application of Whitaker. Thereafter, and on the same day, it having been ordered that the defense of the other defendants stands as the defense of Whitaker, the cause was again submitted on the motion of plaintiff, and judgment was rendered setting aside the order of April 11, 1887, as illegal and void. The plaintiff and Whitaker appeal, the appeal of the latter being first perfected.

I. Before the application of Whitaker to be made a party defendant was granted, objections thereto were made on the ground that the applicant was not a necessary nor a proper party; that his interest in the matter in controversy did not entitle him to be made a party; and that his application was not made in time. The appellant is interested in the order which plaintiff asks to have set aside to the amount of eight hundred dollars. There can be no complete and final adjudication of the matter until appellant has had his day in court. It was said in *Brown v. Bryan*, 31 Iowa, 556, that a railroad company, for whose benefit a tax had been voted, was entitled to intervene in an action brought by taxpayers to enjoin the collection of the tax; and that it was not only a proper but a necessary party to a final and binding determination of the questions involved in the action; and that was true, even though the right to the taxes had not matured. We think Whitaker was entitled to intervene at a proper time. Code, sec. 2683. But it is claimed that his application was not filed in time. It was said in *Henry v. Mill & Elevator Co.*, 42 Iowa, 35, that the intervention must be made before the trial commences, and that it cannot be allowed after that time, nor after a settlement has been effected by the parties to the action. That rule was approved in

1. PARTIES to actions: certiorari: intervention: practice.

Bank v. Gill, 50 Iowa, 427. See, also, *Teachout v. Des Moines Broad-Gauge St. Ry. Co.*, 75 Iowa, 728. We do not think the rule should be rigidly applied where the parties necessary to a determination of the cause are not before the court. In such a case, where the court might order interested persons to be made parties when their interest becomes known, we think the court may properly sustain an application by such persons to intervene. In this case, the judgment to be rendered had been determined by the judge before the application to intervene was made, and we do not say that it might not have been properly denied on that ground; but it does not appear that the granting of the application caused any delay in the final decision of the cause. On the contrary, it is shown that Whitaker was allowed to intervene, that the submission of the cause was set aside, the defense of Whitaker interposed, the cause resubmitted, and final judgment entered on the same day. We think the court did not err in allowing the intervention in view of the interest which Whitaker had in the result of the litigation.

II. It is said that the interest of plaintiff is not such as authorizes him to maintain this proceeding. In *Snyder v. Foster*, 77 Iowa, 640, it was said: "It is well settled that a taxpayer may maintain an action in his own name to prevent unlawful acts by public officers which would increase the amount of taxes he is required to pay, or diminish a fund to which he has contributed." In *Collins v. Davis*, 57 Iowa, 256, it was said that a taxpayer might maintain a proceeding by *certiorari* to review the action of the city council in reducing the assessment of another taxpayer. In this case plaintiff shows that he is a resident and taxpayer of Boone county. If the order complained of is illegal, it will wrongfully increase the expenditures of Boone county, and increase unlawfully the burdens of the taxpayers. The plaintiff is, therefore, entitled to maintain this proceeding under the rule announced in the cases cited.

2. Acts of public officers: review: certiorari.

III. Section 11 of chapter 73, of the Acts of the Twenty-first General Assembly, contains the following provision: "The county attorneys of the several counties in this state shall be allowed an annual salary, to be fixed by the board of supervisors of their respective counties at their June meeting of each even-numbered year as follows: * * * In counties of over twenty thousand [inhabitants] and under thirty thousand, not exceeding one thousand dollars." The board of supervisors of Boone county were authorized to allow the amount named for the years 1887 and 1888. It is said that the salary in question was in fact fixed by the board in June, 1886, at eight hundred dollars, but by mistake it was recorded as fixed at four hundred dollars, and that the action taken by the board in April, 1887, merely authorized the making of a *nunc-pro-tunc* record. The return of alleged facts certified by the county auditor must be construed in connection with the proceedings of the board as recorded. When so considered, it is clear that the mistake of four hundred dollars to which the return refers was a mistake as to the fees which the county attorney would receive in criminal cases, and not a mistake as to the amount of stated salary which the county would pay; and, therefore, that there was no mistake in the record, but that it correctly represents the action which was really taken. We regard the action of April 11, 1887, as designed to increase the amount allowed at the meeting of June, 1886, for the purpose of making the income of the county attorney equal to the amount the board supposed it would be when the action at the meeting last named was taken. There is no showing that appellant was mistaken as to the compensation which the county attorney would be entitled to receive by virtue of the action of the board when he became a candidate for the office in 1886, when he was elected, and when he qualified and entered upon the discharge of the duties of the office. The mistake of the board was one of law. If the relation between the appellant and the county be

8. SALARY of county attorney: when determined: change during term: validity.

regarded as contractual in its nature, the mistake would have afforded appellant no ground for relief. The order in controversy was not made to discharge any legal obligation, and must be regarded as voluntary.

It is said that the law of contracts does not apply to this case, and that the board of supervisors may at any time increase or diminish the salary of the county attorney, even during his term of office. The general rule has been stated as follows: "A municipal corporation may, unless restrained by charter, or unless the employment is in the nature of a contract, reduce or otherwise regulate the salaries and fees of its officers according to its view of expediency and right. Although an officer may be elected or appointed for a fixed period, yet, where he is not bound, and cannot be compelled to serve for the whole time, such election or appointment cannot be considered a contract to hire for a stipulated term. Ordinances fixing salaries are not in the nature of contracts with officers." 1 Dill. Mun. Corp., sec. 170. It was held in *Iowa City v. Foster*, 10 Iowa, 191, that there is nothing in the nature of a contract pertaining to the relation between municipal corporations and their officers. The act which created the office of county attorney provides for the resignation of the officer. Acts, 21st Gen. Assem., sec. 9, ch. 73. Therefore, if the general rule governs in this case, the salary of the county attorney may be changed during his term of office. Section 3789 of the Code allowed the sheriffs of certain counties annual salaries to be fixed by the proper boards of supervisors. Referring to that provision, this court said in *Holmes v. Lucas County*, 53 Iowa, 212, that, although the statute did not prescribe the time when the board should act, yet it might properly do so before the service was rendered; and that the allowance of the salary at the commencement of the official term is demanded by fair dealing. What was said in that case may well be said of the salary of county attorney without regard to the statute; but when that is considered, and the motives which must have prompted its enactment, we must conclude

that it was the intent of the general assembly that the salary of the officer should not be changed during his term of office, but should be fixed before his election. If it may be increased it may be diminished, and in that case it would be within the power of the board of supervisors in many cases to determine who should hold the office by withholding an adequate salary from the person elected to fill it, and thus compelling him to resign. It is for the interest of the public to have the office filled by a competent and worthy person. As a rule, an attorney of ability and experience, established in the practice of his profession, would not assume the duties and burdens of the office, and hence would not be a candidate for it, nor consent to an election to it, unless he knew what salary he could depend upon receiving. It is the privilege of the electors of each county to select their county attorney, but it is a barren one if their will may be thwarted by the board of supervisors in the manner suggested. On the other hand, if the board have the power to increase the salary within the limits fixed by statute at pleasure, it might lead to favoritism and gross abuse. The county attorney is to be elected at the general election of each even-numbered year. The board are required by the statute to fix the salary at their regular meeting held in the preceding June. When the salary is fixed, attorneys will make known their willingness to perform the duties of the office, and the electors can select from the attorneys available the one whom they would prefer to have serve them. It is our opinion that the salary fixed before the officer is elected cannot be changed after his election, and that the salary named in the proceedings of the board of supervisors had at the June meeting, 1886, is the only one to which appellant was entitled, even though it was fixed under a misapprehension of the law. Our conclusion in regard to the legislative intent and considerations of public policy require us to so hold.

The judgment of the district court is AFFIRMED.

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JENNIE SMITH *et ux.*, Appellants, v. JOHN DE KOCK, Appellee.

1. **Sheriff's Deed: EXECUTION SALE: HOMESTEAD: PLATTING.** The plaintiffs being the owners of forty acres of land, on which was situated their dwelling, and of fifteen acres adjoining, all of which was occupied as a homestead, but was subject to the lien of a judgment in favor of defendant, the latter caused an execution to be levied thereon. Thereupon plaintiffs served notice upon the sheriff that the forty-acre tract was claimed as a homestead. *Held*, that plaintiffs' notice rendered the platting of the homestead prior to sale under the execution unnecessary, and for an omission to plat same a sheriff's deed based upon such sale would not be set aside.

2. **——: ——: RETURN OF EXECUTION: EVIDENCE.** The sheriff's return of the execution showed that the two tracts of land were offered separately, but did not show which was offered first. *Held*, that it was competent to show by parol evidence the order in which the different parcels were offered for sale.

Appeal from Marion District Court.—HON. O. B. AYERS, Judge.

WEDNESDAY, OCTOBER 29, 1890.

ACTION in equity to set aside a sheriff's deed. Decree was entered dismissing plaintiffs' petition. The plaintiffs appeal.

Bolton & McCoy and *Gesman & Prouty*, for appellants.

Bosquet & Earl, for appellee.

GIVEN, J.—I. The plaintiffs are husband and wife, and were the owners of a certain forty-acre tract of land upon which the dwelling of the family was situated. They also owned fifteen acres adjoining, the entire fifty-five acres being used and occupied together as the homestead of the family. At the time of the sheriff's sale, John Smith was insane, and detained in the hospital at

1. SHERIFF'S deed: execution sale: homestead: platting.

Mt. Pleasant. The defendant had execution upon a judgment against John Smith, rendered upon an indebtedness which antedated the occupancy of the land as a homestead, which execution was levied upon the fifty-five acres. Mrs. Smith caused notice to be served upon the sheriff, claiming the forty-acre tract as the homestead of the family. The sheriff's return shows that he proceeded to sell said real estate "by offering the same in separate parcels, receiving no bid for either the forty-acre tract or the fifteen-acre tract, and thereafter John De Kock then and there bid for the above-mentioned real estate as follows, to-wit, the sum of four hundred and twenty-nine dollars," etc. This being the highest and best bid, the entire fifty-five acres were returned as sold to appellee, and upon this sale the deed in question is based. The grounds of objection to the deed are that the sale was made without platting the homestead, and without first offering the fifteen acres. Plaintiffs were entitled to have their homestead designated, and to have the other lands first offered for sale. A platting of the homestead would simply have been a platting of the forty-acre tract. By the notice from Mrs. Smith, the selection was, under the law, as definite as a platting would have made it. The law does not require useless things, and certainly the deed will not be set aside for an omission to do this useless thing, if the sale was otherwise regular.

II. It will be observed that the sheriff's return shows that the land was offered in separate parcels, but does not show which parcel was offered first. On the trial the sheriff was asked which tract he first offered, and the answer taken subject to plaintiffs' objection. The answer was not to vary or contradict the return, but to show a fact that did not appear therein, and was, therefore, competent. The sheriff answered that, to the best of his knowledge, the fifteen-acre tract was offered first. In this he is corroborated by the presumption that he did his duty, and it was clearly his duty to first offer the

2. ——: ——: return of execution: evidence.

land other than the homestead. He is further corroborated by the testimony of Mr. Bosquet, who was present at the sale, and testifies that the fifteen acres were first offered. The defendant's judgment being a lien upon all the lands for a debt incurred prior to the occupancy of the land as a homestead, the defendant had a right to subject the entire fifty-five acres to sale, if necessary, to satisfy his judgment. Plaintiffs had the right to designate their homestead, or have the same designated, and to have the lands other than the homestead first offered for sale. In the sale the law was observed in all these respects, except that the designation of the homestead was not done by platting the same. The omission, if it may be called such under the circumstances, was without prejudice to the rights of the plaintiffs. Aside from the consideration already mentioned, it is evident that the fifteen acres would have been insufficient to satisfy the execution, which was for four hundred and twenty-nine dollars, and the sale of the homestead would have followed as a necessary consequence.

The decree of the district court must be AFFIRMED.

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WILLIAM PICKRELL, Appellant, v. J. P. HIATT, Administrator, Appellee.

1. **Claim Against Estate of Decedent:** DEMURRER. A claim filed against the estate of a decedent alleged the indebtedness of said estate to the claimant, on account of the payment by him of one-third of the amount of a judgment against the decedent, the claimant and another, in a sum stated, with interest. *Held*, on demurrer, that the facts stated did not entitle the claimant to the relief demanded.

2. **Appeal:** CERTIFICATE OF JUDGE: PRACTICE. In causes involving less than one hundred dollars, and which are presented for hearing in the supreme court upon questions certified by the judge of the trial court, only questions arising upon the record will be considered, and the supreme court will look beyond the certificate to see if the questions certified are necessarily involved in the case.

Appeal from Mahaska District Court.—HON. DAVID RYAN, Judge.

WEDNESDAY, OCTOBER 29, 1890.

ON January 24, 1889, appellant filed his claim, duly verified against the estate of J. E. Bailey, deceased, as follows:

"The said Wm. Pickrell claims of said J. P. Hiatt, as administrator of said estate, the sum of seventy-five dollars as per the following statement: To one-third amount of judgment against J. E. Bailey, Wm. Pickrell and Anna P. Shaw, and in favor of Leighton & Moore, shown on judgment docket 5, page 210; said Pickrell having paid one-third of said judgment amounting to thirty-three dollars and seventy cents, at date of judgment, April, 16, 1878; the interest thereon amounting to $38.64; total amount due, $74.34. The within claim, to the amount of $74.34, is admitted this eleventh day of February, 1889. J. P. HIATT,

"Administrator."

Appellant afterwards filed an amendment alleging that J. E. Bailey died on or about ———, 1880; that J. P. Hiatt, was appointed administrator on the second day of December, 1881; and that notice of his appointment was never given, as provided by law. The heirs of J. E. Bailey demurred to the original claim and amendment, upon the grounds that: "*First.* The facts stated do not entitle the said Pickrell to the relief demanded; *second*, the claim and amendment thereto show on their face that the claim is barred by the statute of limitation." The demurrer being sustained, and, appellant electing to stand upon his claim and amendment, judgment was entered against him for costs. The amount in controversy being less than one hundred dollars, the court certified the following questions for the opinion of this court: "*First.* Is the claim barred by the statute of limitations? *Second.* Will a demurrer on the ground that the claim is barred by the statute of limitations lie

after the same has been admitted by the administrator? *Third.* Does the statute of limitations run upon a claim against an estate of a deceased person after the appointment of an administrator, and before the publication, as provided by law, of notice of his appointment? *Fourth.* Does the statute of limitations, which had been suspended by non-residence of deceased, again commence to run upon his death, said deceased having real estate in Mahaska county, Iowa, and an administrator having been appointed in said county, December 2, 1881?" Upon this certificate, the plaintiff appeals.

Haskell & Greer and *D. C. Waggoner*, for appellant.

Bolton & McCoy, for J. P. Hiatt, administrator, appellee.

J. F. & W. R. Lacey and *J. M. Herron*, for Sara Bailey, appellee.

GIVEN, J.—I. On this appeal, this court will only consider questions involved in the case and certified by the trial judge. Questions not involved in the case will not be considered, though certified, nor will questions involved be considered that are not certified. Code, sec. 3173. The case involves only the questions raised by the demurrer to appellant's petition or statement of his claim, and are to be determined from the facts of the petition, and not from any statement or finding of facts not alleged therein. The trial judge certifies as facts matter not stated in the petition, such as that deceased was a resident of Iowa, and removed therefrom to Kansas in 1880, and died in Kansas in 1880; that deceased owned real estate in Mahaska county; and that appellant's claim was not approved by the clerk. These facts, not appearing in the petition, cannot be considered in passing upon the demurrer.

1. CLAIM against estate of decedent: demurrer.

The first ground of demurrer is that the facts stated do not entitle appellant to the relief demanded. No objection was made to this ground as being too general,

and no question as to its sufficiency is certified. Appellant states his claim to be "to one-third amount of judgment against J. E. Bailey, William Pickrell, and Anna P. Shaw, and in favor of Leighton & Moore, shown on judgment book, page 210, said appellant having paid one-third of said judgment." All this may be confessed, and yet no liability exist on the part of the estate. For anything that appears, appellant may have been principal in the judgment, or equally liable with the other parties to it. Clearly, the petition does not state facts that entitle appellant to the relief demanded.

II. The other ground of demurrer was that the claim showed on its face that it was barred by the statute of limitations. The demurrer was sustained generally; whether upon the first or second grounds, or both, does not appear. If upon the first, then it was properly sustained, and, if so, the question as to the bar of the statute, was not involved in the case. This court will look beyond the certificate to see if the questions certified are involved in the case. *Swails v. Cissna*, 61 Iowa, 693; *McLenon v. Kansas City, St. J. & C. B. Ry. Co.*, 69 Iowa, 320; *Miller v. Buena Vista Co.*, 68 Iowa, 711. Looking to the record before us, we think the questions certified were not necessarily involved in the case. Therefore, the appeal should be DISMISSED.

2. APPEAL: certificate of judge: practice.

ELIZABETH FURMAN, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

1. **Common Carrier: BILL OF LADING: POSSESSION: PRESUMPTION.** The possession of a bill of lading by the husband of the shipper named therein, and its exhibition by him to the carrier that issued the same at the time of giving orders in regard to the reshipment of the goods therein described, warrants the presumption that the husband in giving such orders is acting as the agent of the wife, and the carrier will be entitled to act thereon.

2. ——— : ——— : ATTACHMENT OF PROPERTY : NOTICE TO SHIPPER. The plaintiff shipped a quantity of household goods from Chicago by way of defendant's railway to Atchison, Kansas. In an action to recover the value of said goods for the failure of defendant to transport them to their destination, the jury returned a special verdict, finding that subsequent to the shipment the plaintiff's husband called at defendant's office in Muscatine, Iowa, with the bill of lading in his possession, to order the delivery of said goods at Muscatine instead of at Atchison, and was then notified by defendant that the goods had been taken from its possession in Chicago under a writ of attachment; that this notice to plaintiff's husband was given in time to assert plaintiff's right and title to the goods before the same were sold under the attachment proceedings. *Held*, that defendant's motion for judgment upon the special findings, notwithstanding the general verdict, ought to have been sustained.

Appeal from Muscatine District Court.—HON. C. M. WATERMAN, Judge.

WEDNESDAY, OCTOBER 29, 1890.

THIS is an action to recover the value of certain household goods, which it is alleged the plaintiff delivered to the defendant at Chicago, Illinois, for shipment to Atchison, Kansas. Recovery is sought upon the ground that the defendant failed to transport the goods to their destination. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Thos. S. Wright and *J. Carskaddan*, for appellant.

Jayne & Hoffman, for appellee.

ROTHROCK, C. J.—I. The cause has already been three times in this court on appeal by defendant. See 57 Iowa, 42; 62 Iowa, 395; and 68 Iowa, 219. The judgment was reversed in each of said appeals. The material facts in the case were fully stated upon the former appeals, and it is not necessary to make any statement here except in some slight particulars in which the evidence varies, or has been changed upon the different

1. COMMON CARRIER : bill of lading : possession : presumption.

trials. Upon the first appeal, this court found that the evidence showed, "without conflict, that plaintiff's husband acted for her in delivering the goods to defendant, and that the shipping receipt was delivered to him." Upon the second appeal, it was found that the evidence tended "to show that the plaintiff's husband attended to the delivery of the goods to the defendant for shipment to Atchison, and that he received the shipping receipt therefor." In the third appeal, it is said "it is not necessary that we should again make a detailed statement of the facts. They appear now to be substantially the same as before, except that before the testimony of the plaintiff's husband showed that he acted for the plaintiff in delivering the goods to the defendant for shipment as a common carrier. That evidence has now been excluded upon the plaintiff's objection. It does not now appear who acted for the plaintiff in making the delivery of the goods, except that he was a man by the name of Furman."

In the present appeal, it is claimed by the plaintiff that her husband had no connection with the shipment of the goods; but that they were removed from a warehouse by a drayman, who delivered the shipping receipt to her, and that she put the receipt in her trunk, and locked the trunk, and that she never at any time delivered the receipt to her husband. The last trial was a full hearing on all the facts. The court submitted to the jury certain special interrogatories, which, with the answers made thereto by the jury, are as follows: "*First.* Did the plaintiff, Elizabeth Furman, go to the railroad depot at Chicago with the goods in controversy, when they were delivered there for shipment to Atchison? *A.* No.

"*Second.* Did the plaintiff personally see any agent of the defendant railway company in regard to the shipment of said goods from Chicago to Atchison? *A.* No.

"*Third.* Was George M. Furman, the husband of plaintiff, present at the delivery of the goods in question, or any of them, at the railway depot at Chicago

when they were delivered there for transportation to Atchison? *A.* No.

"*Fourth.* Were the goods taken from the custody of the defendant (railway company) at Chicago by an officer of the law, on a writ of attachment against plaintiff's husband? *A.* Yes.

"*Fifth.* Were said goods household goods which had been used by the plaintiff and her husband in their housekeeping and family? *A.* Yes.

"*Sixth.* Did George M. Furman, the husband of plaintiff, have the railway receipt or bill of lading for these goods which was issued by defendant at Chicago in his possession at Muscatine, Iowa, on or about June 5, 1878? *A.* Yes.

"*Seventh.* Did George M. Furman, the husband of plaintiff, show the railroad receipt for the goods to any agent or employe of the defendant railway company at Muscatine, Iowa, on or about the fourth or fifth of June, 1878? *A.* Yes.

"*Eighth.* Did George M. Furman, the husband of plaintiff, on or about the fourth or fifth of June, 1878, request any agent or employe of the defendant at Muscatine, Iowa, to have said goods reshipped from Atchison to Muscatine? *A.* Yes.

"*Ninth.* Did the husband of plaintiff, on or about the fifth of June, 1878, at Muscatine, Iowa, learn that the said goods had been attached at Chicago? *A.* Yes.

"*Tenth.* Was George M. Furman, the husband of plaintiff, notified or told by an agent or employe of defendant at Muscatine, Iowa, on or about June 5, 1878, that the goods in question had been attached at Chicago, and had never gone to Atchison? *A.* Yes.

"*Eleventh.* Did the husband of plaintiff send money to one Minard, a lawyer at Chicago, to settle the attachment claim, and release the goods? *A.* Yes.

"*Twelfth.* Did Minard, the Chicago lawyer, receive money from Furman to settle the attachment suit in which said goods were sold under the attachment? *A.* Yes.

"*Thirteenth.* Did plaintiff's husband learn that said goods had been attached in Chicago in time to assert plaintiff's title and right to the goods before they were sold in the attachment proceedings? *A.* Yes."

The only real question in the case is whether the defendant should be held to have discharged its duty as a common carrier by the giving of the notice of the attachment of the goods to the husband of the plaintiff. It appears on the third appeal that the defendant asked an instruction to the jury in these words: "If it appears from the evidence that George M. Furman, the husband of the plaintiff, had the railroad receipt or bill of lading, on which plaintiff brings this suit, in his possession at Muscatine, and exhibited it to the agent of the railroad company at Muscatine, and requested that the goods therein named should be reshipped to Muscatine, then the railroad company had the right to presume and act and rely on the presumption that George M. Furman was the duly-authorized agent of the plaintiff in regard to the shipment and control of the goods in controversy." The district court gave this instruction, but modified so that it should be made to appear that Furman held the receipt with the authority or knowledge of the plaintiff. This court held that the defendant was entitled to have the instruction given without modification. That would appear to have been an end of this case. That was the law of the case, and it is wholly immaterial, so far as the liability of the defendant is involved, how or by what means the husband acquired the possession of the receipt. If the railroad company had the right "to presume, act and rely on the presumption" that the husband was the agent of the plaintiff from the fact that the receipt was in his possession, without further inquiry, no showing of facts as to how he acquired such possession would make the defendant liable. It is not necessary to repeat the argument of the court upon that proposition. That part of the opinion which points out a method by which the wife may prevent her husband from obtaining possession of the shipping receipt in no manner affects the

question of law determined in holding that the modification of the instruction was erroneous.

II. The defendant moved for a judgment upon the answers to the special interrogatories notwithstanding the general verdict, which motion was overruled. We think it should have been sustained. It is only necessary to examine the former opinions in this case to reach the conclusion that the answers to the questions completely exonerate the defendant from all liability.

2. —: —: attachment of property: notice to shipper.

It is claimed in behalf of appellant that the defendant waived the motion for judgment by afterwards filing a motion for a new trial. It is not necessary to determine that question. The motion for a new trial was withdrawn before any action was had thereon, and the cause then stood precisely as it would have done if it had not been filed. In our opinion, the motion for a judgment upon the answers to the special interrogatories should have been sustained, and the cause will be remanded to the court below, with directions to enter a judgment for the defendant, or, at the defendant's option, such judgment will be entered in this court. REVERSED.

JAS. H. LAKIN, Administrator, Appellee, v. C. H. MCCORMICK & BRO., Appellants, AND W. W. SPRAGUE *et al.*, Appellees.

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Judgment Lien : LIMITATION : EXECUTION. The lien of a judgment will not be extended, as against a junior lienholder, by the levy of an execution thereon within the period of limitation, but without a sale thereunder until after the expiration of ten years from the date of the judgment.

Appeal from Fayette District Court. — HON. L. O. HATCH, Judge.

WEDNESDAY, OCTOBER 29, 1890.

W. W. AND P. D. SPRAGUE are codefendants in this case, but not appellants. Plaintiff is the administrator of the estate of H. Rush, deceased, and brings this action to foreclose a mortgage given by defendants Sprague to secure the purchase price of certain real estate, as to which arises a question as to priority of liens. January 16, 1872, the premises were owned by Thomas Smith, and on that day appellant obtained a judgment against Smith, in the district court of Fayette county, for one hundred and twenty-five dollars. Smith thereafter sold the premises to H. Rush, who conveyed them to the defendants Sprague, and took back the mortgage in suit. Appellant was made defendant to foreclose its interest in the premises, and it claims a priority as to liens based on facts as follows: That it obtained its judgment while Smith was the owner of the premises; that it took execution on said judgment on the fourteenth of January, 1882, which was levied upon the premises on the same day; that the premises were sold under said execution on the eighteenth day of February, 1882, and that appellant became the purchaser thereof, and in due time received a deed in pursuance of the sale. Upon this statement as to facts, the district court gave judgment for the plaintiff, and C. H. McCormick & Bro. appeal.

Lake & Harmon, for appellant.

Ainsworth & Hobson, for appellees.

GRANGER, J.—It will be observed that the gist of the controversy is as to the effect of the levy of the execution on the premises, January 14, 1882. But for such levy appellant's lien would have expired January 16, 1882, and plaintiff's mortgage, before that a junior lien, would have taken precedence; and we are to inquire if the levy of the execution defeats such a result. The arguments bring in question the effect of our holding in the case of *Albee v. Curtis*, 77 Iowa, 644. In that case the defendant firm was a judgment lienholder, junior

to the plaintiff's mortgage lien, and was not made a party to the plaintiff's foreclosure proceeding, and hence its period of redemption was not limited by decree, and, as the judgment lien gave rise to the right of redemption, the latter would expire with the former. The defendant took execution on its judgment, and made a levy thereon December 13, and its lien would have expired January 1 thereafter, and the sale to Curtis & Morey was February 7. In that case, it was urged that because the execution issued before the expiration of the ten years, and the land was afterwards sold thereon, the lien of the judgment was extended. But we held otherwise, and that the lien was measured by the statute fixing its duration at ten years from the date of the judgment. Code, sec. 2882. It is said by appellant in this case that the two cases are not so alike that the holding in that should be of controlling importance in this. It is true that the cases are in some respects unlike, and yet the controlling facts seem to be the same. In that case, a junior lienholder, by taking his execution before, and making his sale after, the statutory period, sought to avoid the operation of the statute in favor of the senior lienholder. In this case, the senior lienholder, by doing the same thing, seeks to avoid the operation of the statute in favor of the junior lienholder. The controlling question in both cases is as to the effect of the levy and sale under the execution. A careful study of the consequences to result from an application of the law, in general, furnishes no reasons for applying different rules to the two cases. It is a construction of the same statute as applicable to the same facts, barring the class of the lienholder invoking its aid.

It is said that, if the rule contended for by appellee is to prevail, the sale of land might be enjoined by some other creditor, and thus defeat the sale, or render it of no effect. Following the line of thought, so might the levy of the execution be enjoined, and it is not pretended but that the levy must be made to preserve the lien. But the thought is not controlling. If a court

should grant an injunction in such a case, we may assume it would provide for the safety of the parties by suitable bond. And further, without committing ourselves to any rule under such a state of facts, there is both reason and authority for making such interference by legal process as to defeat the sale within the limitation a ground for extending the lien. *Little v. Harvey*, 9 Wend. 157; *Graff v. Kip*, 1 Edw. Ch. 619.

It is claimed to be unreasonable that a party should have the right to an execution and levy on the land, and not the right to sell under the levy. Speaking only with regard to the respective lienholders, the party has the same right to one as the other. If he seeks the advantages of his lien, he should not defer action until it is too late to perfect his rights thereunder. The law fixes the period, and provides the means for rendering his lien effectual. If he neglects action until too late to complete his work within the period, then the right to make the levy is a barren one; in effect no right. We are referred to the cases of *Barth v. Bank*, 4 N. E. Rep. (Ill.) 509, and *Riggs v. Goodrich*, 74 Mo. 108, in both of which there is a holding, under a similar state of facts, that the levy of the execution extends the lien. In the Illinois case, under the provisions of an act of 1872, it extends for one year. The Missouri case is under a law much like ours, and the levy extends the lien of the judgment "until the writ is executed." Our holding has strong support in a number of cases in New York, of which see *Little v. Harvey* and *Gaff v. Kip*, *supra*. *Tufts v. Tufts*, 18 Wend. 621; *Mower v. Kip*, 6 Paige, Ch. 88; *Ex parte Peru Iron Co.*, 7 Cow. 553. The uniform holding of this court has been in accord with the language of the statute, that the lien extends ten years from the date of the judgment. *Denegre v. Haun*, 13 Iowa, 245; *Bertram v. Waterman*, 18 Iowa, 519; *Hendershott v. Ping*, 24 Iowa, 134; *Boyle v. Maroney*, 73 Iowa, 70. It is true these rulings have been on facts differing from this case, and they are cited only as showing how the

language of the law has generally been considered. If exceptions are to be made, they should be for reasons more cogent than appear in this case.

The judgment of the district court is AFFIRMED.

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THE FULLERTON LUMBER COMPANY, Appellant, v. W. H. SPENCER, Appellee.

Attachment: WRONGFUL ISSUE: DAMAGES. In an action for the wrongful suing out of an attachment against property used only for the purposes of sale the owner is not entitled to recover, as damages, interest on the value of such property from the time of seizure, without a showing of any loss merely from the failure to have the property on hand.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 29, 1890.

ACTION on account for lumber, aided by attachment. Defendant admits the indebtedness as claimed, but, by way of cross-action, alleges that the attachment was wrongfully sued out, and the issues arise on defendant's counterclaim. The jury found specially that the writ was wrongfully sued out, and, by its general verdict, found for defendant in the sum of forty-one dollars and forty-nine cents, for which judgment was entered, and the plaintiff appeals.

Stone & Owen, for appellant.

No appearance for appellee.

GRANGER, J.—The plaintiff, by virtue of the attachment, seized a quantity of lumber which was kept for sale in a lumber-yard, and the court instructed the jury

that there was no depreciation in the value of the property taken, and that nothing could be allowed therefor. The court then said to the jury: "If you find that the property was for use only for the purposes of sale in a lumber-yard, then the value of the use would be interest at six per cent. per annum on the value of such lumber so taken for the time the same was withheld from defendant." Complaint is made of the rule given, and we think justly. There is no showing of any loss to defendant by the taking of the lumber merely because of a failure to have it on hand, that is, no sale of it was lost; and under the instruction of the court it must be regarded as not damaged. If the lumber had not been taken, defendant could not, in the nature of things, have kept the lumber on hand and received what the rule of the court gave him. If by the taking defendant was deprived of any use of the lumber, the value of such use is his damage. It is not of a class of property that the law presumes will be used in the sense of the use being of value to the owner barring that of its use for sale, and no claim is made of damage because of a loss of sale, and for such damage a different rule would apply. The general rule is, where personal property is wrongfully taken and detained for a time from the owner, the value of its use during such time. If it has no such value, the damage must be said to be nominal, and a rule of general damages that would give interest on the value in such a case is erroneous. The case must be reversed for the error indicated, and, as there is no appearance for appellee to aid us by a brief and argument, we do not consider other questions. See *McKern v. Albia*, 69 Iowa, 447; *Deeds v. Chicago, R. I. & P. Ry. Co.*, 69 Iowa, 164; *Gilfeather v. Council Bluffs*, 69 Iowa, 310; and *Dodd v. Scott*, *ante*, p. 319. The judgment below is REVERSED.

COOK & WHEELER, Appellees, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant..

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1. **Common Carriers:** FREIGHT CHARGES: REBATES. The plaintiffs, who were shippers of cattle, were charged by the defendant from three to ten dollars per carload of cattle shipped over its road in excess of the charges made to other shippers for the same service and under the same conditions, the difference being allowed the favored shippers in the shape of a secret rebate, which fact was concealed from the plaintiffs. *Held*, that at common law a common carrier is entitled to a reasonable charge only for the service rendered; that its discriminations in favor of other shippers were evidence that the charges demanded of plaintiffs were unreasonable; and that the plaintiffs were entitled to recover the difference between the charges paid by them and the more favorable rates granted to other shippers.

2. ——: ——: ——: VOLUNTARY PAYMENT. A payment of money in the belief that the demand is proper, and without the knowledge that it is wrongfully exacted, is not voluntary, and may be recovered back.

3. ——: ——: ——: ——: LIMITATION OF ACTIONS. The plaintiffs having been kept in ignorance of their rights through the fraudulent concealment of the facts by the defendant, *held*, that the statute of limitations did not begin to run as to their cause of action until their discovery of the facts on which the action was based.

4. **District Court Rules:** COPIES OF PLEADINGS: EXCESSIVE FEES. Rule number one of the district court rules does not require that a literal copy should be made of various pleadings in a cause which are precisely alike, except, possibly, a date, an amount, or the like; and a charge under said rule of five hundred and eighty-two dollars for copies of such pleadings, the printing of which cost but thirty dollars for both originals and copies, *held*, should be reduced to fifteen dollars.

Appeal from Jaspe. District Court.—HON. D. RYAN, Judge.

WEDNESDAY, OCTOBER 29, 1890.

THIS is an action at law to recover of the defendant certain alleged overcharges for the shipment of a large number of carloads of live stock from Jasper county, in this state, to the Union Stock-Yards, near Chicago, Illinois. The shipments were alleged to have been made between June, 1879, and April 22, 1883. The cause was referred to a referee to make up the issues, and try and determine the case, and report to the court. A trial was had, and a report was filed recommending a judgment for the plaintiffs. The defendant filed exceptions to the report. The exceptions were overruled, and a judgment was entered upon the report. The defendant appeals.

T. S. Wright, *Robt. Mather* and *Winslow & Varnum*, for appellant: The plaintiffs are not entitled to recover in any event. We assert the following to be the law: *First.* The only restriction imposed by the common law upon the common carrier, with reference to his rates of compensation was, that they should be reasonable. *Second.* Subject to this restriction only, he might discriminate as to the rates charged his customers, and might carry for one at one rate, and for others at a less, or even *gratis*. *Third.* A customer, to whom a rate reasonable in itself has been charged, cannot complain because a less rate has been granted others. *Railway Co. v. Sutton*, 4 Eng. & I. App. 226; *Baxendale v. Railway Co.*, 4 C. B. (N. S.) 62; *Brantey v. Railway Co.*, 12 C. B. (N. S.) 63; note to *Coggs v. Bernard*, 1 Smith's Leading Cases [8 Ed.] 394; Story on Bailments, sec. 508; 1 Wood's Ry. Law, 566; *Fitchburg Ry. Co. v. Gage*, 12 Gray, 393; *Sargent v. B. & L. Ry. Co.*, 115 Mass. 416; *Menacho v. Ward*, 27 Fed. Rep. 529; *United States ex rel. v. Railway Co.*, 40 Fed. Rep. 101. Mere discrimination in rates is not unlawful. It is only unjust discrimination which is prohibited. In determining what was an "undue or unreasonable preference" in favor of one shipper, "the fair interests of the railway company ought

to be taken into account." *Ransome v. Railway Co.*, 38 Eng. L. & Eq. 231; *Oxlade v. Railway Co.*, 40 Eng. L. & Eq. 234; *Nicholson v. Railway Co.*, 5 C. B. (N. S.) 366; *Concord & P. Ry. Co. v. Forsaith*, 59 N. H. 122; Wood's Ry. Law, 566, *et seq.; Logan v. Railway Co.*, 2 Inter S. C. C. Rep. 604. The payments made by plaintiffs were voluntary, and cannot be recovered back. 1 Parsons on Cont. 466; *Eversheds v. Railway Co.*, L. R. 3 Q. B. Div. 144; s. c., L. R. 3 App. Cas. 1029; *Gt. W. Ry. Co. v. Sutton*, 3 H. & C. 800; s. c., L. R. 4 H. L. Cas.. 226; *Lancashire Ry. Co. v. Gidlow*, L. R. 7 H. L. Cas. 517; *Parker v. Railway Co.*, 7 Man. & G. 253; *Killmer v. Railway Co.*, 100 N. Y. 395. A court may not delegate its discretionary powers unless expressly authorized. The fact that other functions of the court are specifically conferred upon the referee is conclusive of the intention not to delegate this particular power. The referee is not a court, nor does he hold any term within the meaning of Code, sections 3687, 3684, 3685, 3686. *Hobart v. Hobart*, 45 Iowa, 503. Authorities are all against the power of a referee to order production of books and papers. *Frazer v. Phelps*, 3 Sandf. (N. Y.) 741; *Willis v. Bailey*, 19 Johns. 268. If a referee may, in a proper case, order the production of books and papers, there was error in making the order in this case. Wharton on Evidence, sec. 754; Story, Eq. Juris., sec. 1485, n. 7; *Miller v. Mather*, 5 How. Pr. 160; *Willis v. Bailey*, 19 John. 268; *McAllister v. Pond*, 15 How. Pr. 299; *Finch v. Rikeman*, 2 Blatchf. 301; Story Eq. Juris., sec. 74; *Gelston v. Hoyt*, 1 Johns. Ch. R. 546; *Pegram v. Carson*, 10 Abb. Pr. 340; *Commercial Bank v. Dunham*, 13 How. Pr. 541; *Wood v. DeFiganiere*, 25 How. Pr. 522; *Avinger v. Railway Co.*, 7 S. E. Rep. (S. C.) 493; *Garten v. Railway Co.*, 1 B. & S. 112; *Ragan v. Aiken*, 9 Lea, 609; *Johnson v. Railway Co.*, 16 Fla. 667; *Sutton v. Railway Co.*, 3 H. &. C. 841; *Eclipse Tow Boat Co. v. Railway Co.*, 24 La. Ann.; *Christie v. Railway Co.*, 7 S. W. Rep. (Mo.) 567; *T. W. & W. Ry. Co. v. Elliott*, 76 Ill. 67; *Erie & P. D. Co. v. Cecil*, 112 Ill. 185; *C. & A. Ry. Co. v.*

Cole Co., 79 Ill. 121.; *Ex parte Benson*, 18 S. C. 38; *Peck v. Railway Co.*, 10 H. L. 511; *Bastard v. Bastard*, 2 Shaw. K. B. 82; *Harris v. Packard*, 5 Taunt. 264; *Citizens' Bank v. Railway Co.*, 2 Story, 35; 1 Chitty, Cont. 684; 2 Rorer on R. R. 1375. A referee has no power, under the Code, to order the production of books and papers. Under Code, secs. 3685, 3686. In the cases where the statute has been applied in this state, the application has not gone beyond entries relating to dealings between the parties litigant. *Sheldon v. Mickel*, 40 Iowa 19; *Allison v. Vaughn*, 40 Iowa, 421. To sustain such a rule, the applicant must have a legal or equitable interest in the document, and it must appear that the paper is in the hands of the holder as in some sense the trustee of the applicant. Wharton on Evidence, secs. 743, 746, 755; *Eschbach v. Lightner*, 31 Md. 532; Story, Eq. Pl., sec. 858; *Attorney General v. Corp. of London*, 2 Mac. & Gord. 247; *Ringgold v. Jones*, 1 Bland. (Md.) 90, note. In such cases it should appear that the applicant has an interest in the document for that special purpose. *Duval v. Farmers' Bank*, 2 Bland. (Md.) 687; *Powell v. Bradbury*, 4 M. G. & S. 541; s. c., 13 Jur. 349; *Bank of Utica v. Hillard*, 6 Cowen, 62; *Willis v. Bailey*, 19 John. 268; *Woods v. DeFiganiere*, 25 How. Pr. 526; *Watson v. Renwick*, 4 Johns. Ch. 382; *Gas Co. v. Clarke*, *supra*; *Ratcliffe v. Bleasby*, 3 Bing. 150; *Rundle v. Beaumont*, 4 Bing. 537; *Rowe v. Howden*, 4 Bing. 539; *Fessel v. Millington*, 1 Moore & Scott, 605; *Powell v. Bradbury*, 4 M. G. & S. 541; *Morrice v. Swaby*, 2 Beav. 500; *Gardner v. Dangerfield*, 5 Beav. 389; *Llewellyn v. Badeley*, 1 Hare, 527; *Parsons v. Robertson*, 2 Keen, 605; *Curd v. Curd*, 1 Hare, 274; *Smith v. Massie*, 4 Beav. 417. The order was too broad and indefinite. *Commercial Bank of Albany v. Dunham*, 13 How. Pr. 541; *Pegram v. Carson*, 10 Abb. Pr. 340; *Hackling v. Edmonds*, 3 E. D. Smith, 539; *Cassard v. Hinman*, 6 Duer. 695; *Hoyt v. Am. Ex. Bank*, 1 Duer. 602; *People v. Rector*, 6 Abb. Pr. 177; *Davis v. Dunham*, 13 How. Pr. 425; *Gould v. McCarty*, 1 Kern. 575; *Ervin v. Oregon R. & N. Co.*, 22 Hun, 566. There was error in ruling certain

of defendant's officers to answer interrogatories. Code, secs. 3899, 3905; Hare on Discovery, 65, *et seq.;* Story, Eq. Pl., secs. 234, 570, 569, 239; 1 Daniels' Ch. Pl. & Pr. 179; *Wych v. Meal*, 3 P. Will. 310; *Fenton v. Hughes*, 7 Ves. 287; *Moodalay v. East India Co.*, 1 Bro. C. C. 469; *Gibbons v. Bridge Co.*, 5 Price, 491; *Dummer v. Corp. of Chippenham*, 14 Ves. 245; *How v. Best*, 5 Mad. 19; *Glascott v. Copper Miners' Co.*, 11 Sim. 305; *Le Texier v. Margrave of Auspach*, 5 Ves. 322; *Many v. The Beekman Iron Co.*, 9 Paige, Ch. R. 188; *Wright v. Dame*, 1 Metc. 237; *Green v. Woods*, 34 Iowa, 573. The court erred in overruling defendant's motion to retax costs. *Sprout v. Kelly*, 37 Iowa, 44; *Meffert v. Railway Co.*, 34 Iowa, 430; *Kuhulee v. Ind. Dist., etc.*, 36 Iowa, 99.

Alanson Clark, for appellees: The cause of action against the defendant is independent of any statute, and is based upon the common-law rule. The action is to recover freights paid in excess of the reasonable rates. Under certain circumstances discriminations may be made, and they may be reasonable and just. 1 Wood's Railway Law, 565–6. The common law prohibits extortionate rates and unjust discriminations, and requires that the carrier shall demand only a reasonable compensation, and treat competing shippers alike, and prevents their making unjust discriminations. The fact that the high rate charged was not unreasonable does not affect the discrimination. *Samuels v. L. N. Co.*, 31 Fed. Rep. 57. Railways cannot discriminate in favor of or against the tariff, because of its ultimate use. *M. S. & L. Ry. Co. v. D. C. Co.*, 4 Eng. Railway & Canal Cases, 437, 452; *Oxlade v. M. E. R. Co.*, 1 Nev. & Mac. 72. Nor can they discriminate against a local shipper by depriving him of any material advantages. *Ransome v. Railway Co.*, 1 Nev. & Mac. 109; *D. M. C. Co. v. M. S. & L. R.*, 3 Nev. & Mac. 426. Nor can rates be given to one shipper and refused to another on capricious, arbitrary and unreasonable grounds. *Budd v. L. N. W. R.*, 4 Eng.

Railway & Canal Cases, 393. Nor can it discriminate in favor of one local shipper, and against his competitors, unless there be some substantial difference in the cost of the service. *Garton v. Railway Co.*, 1 Nev. & Mac. 218; *Thompson v. Railway Co.*, 2 Nev. & Mac. 115; *Railway Co. v. Eversheed*, 3 App. Cases, 1029; *Stuck v. S. C. Co.*, 16 C. B. (N. S.) 245; *Ransome's Case*, 1 Nev. & Mac. 97; *Nicholson's Case*, 1 Nev. & Mac. 121. The original charge may have been a reasonable toll, but it straightway became an unreasonable and extortional one when a less rate was granted to the competitor for one and the like service under similar conditions. *Messenger v. Railway Co.*, 7 Vroom, 407; s. c., 8 Vroom, 531. Upon the foregoing points see *Winona v. Blake*, 4 Otto, 183; *Alcott v. Bonfield*, 4 N. H. 537; Story on Bailments, sec. 508; *Halford v. Adams*, 2 Durr. 480; *N. E. Co. v. M.*, 57 M. 188; *Vincent v. Chicago*, 49 Ill. 33; Brown's Law of Carriers, 82; *Shipper v. Railway Co.*, 47 Pa. St. 338; *Mun v. Illinois*, 4 Otto (U. S.) 113; *Sanford v. Coltainess*, 25 Pa. St. 376; *Railway Co.'s Appeal*, 62 Pa. St. 218; *Ragan v. Aiken*, Am. & Eng. R. R. Cases, 201; *H. & T. Ry. Co. v. Rust*, 58 Tex. 98; *Merriam v. Railway Co.*, 20 Conn. 353; *Jordan v. Railway Co.*, 5 Cush. 69; *N. J. S. N. Co. v. Merchants' Nat. Bk.*, 6 How. 344; *McDuffee v. Railway Co.*, 52 N. H. 445; *Sloan v. Railway Co.*, 61 Mo. 24; *N. E. Co. v. Railway Co.*, 57 Me. 194; Pierce on Railroads, 498, and authorities cited; *Cole v. Goodwin*, 19 Wend. 261; *Railway Co. v. Erickson*, 91 Ill. 613; *Railway Co. v. Railway Co.*, 15 Fed. Rep. 650, and note; *Hays v. Railway Co.*, 12 Fed. Rep. 490, and note. All special stipulations inserted in the charter of the common carrier for the purpose of securing equal rights to all shippers, as well as statutes passed regulating the same subject, and preventing unjust discriminations, affirm nothing more than the common rights of equal justice, which exists independently of such provisions. *Sanford v. Railway Co.*, 24 Pa. St. 378; *Sharpless v. Philadelphia*, 9 Harris, 169; *Navigation Co. v. Bank*, 6 How.

382; *Shipper v. Railway Co.*, 47 Penn. St. 338; *Railway Co. v. Rust*, 58 Tex. 98; *New Eng. Express Co. v. Railway Co.*, 57 Me. 188; *McDuffy v. Railway Co.*, 52 N. H. 430; *Messenger v. Railway Co.*, 36 N. J. Law, 407; s. c., 37 N. J. Law, 531. The payments made by the plaintiffs were not voluntary. *Heiserman v. Railway Co.*, 63 Iowa, 732.

ROTHROCK, C. J.—I. The action is not founded upon any statute, state or federal. The right to recover is based entirely upon the common law pertaining to the duties and obligations of common carriers. By an amended and substituted petition the plaintiffs claimed unlawful and unjust overcharges upon the shipment of three hundred and sixteen carloads. Each shipment was pleaded in a separate count as a separate cause of action. All of the accounts were alike except in dates of shipment, cars and kind of stock shipped, and stations from which the shipments were made. It is averred, in substance, in the amended petition, that the public tariff rates for shipment of live stock, from any point in Jasper county during the time the plaintiffs made such shipments, was sixty dollars for one carload; that the plaintiffs paid the full amount of said rates, and that certain other shippers (who are named in the petition) also paid the full tariff rates; but that said other shippers were allowed, and defendant paid to them, a rebate or drawback upon each carload shipped by them, which rebate or drawback was paid by defendant to said shippers, under a private and secret arrangement between the defendant company and said shippers; and that the knowledge of the payment of such rebates was wrongfully and fraudulently concealed from the plaintiffs by the defendant, and said other favored shippers; that the agents of the defendant openly announced and declared to the plaintiffs that the public and announced tariff paid by the plaintiffs was correct, and that no cut, rebate or concession from the same was allowed to any

1. COMMON CARRIERS: freight charges: rebates.

shipper, and that the plaintiffs, by reason of said wrongful and fraudulent agreement, did not and could not have discovered it, and they shipped their stock in the belief that no unjust discrimination was made against them. It is charged that the shipments made by the plaintiffs, and those made by the said favored shippers, were for precisely the same service, from the same places, upon like conditions, and under precisely the same circumstances, and that the rate charged by the defendant and paid by the plaintiffs was unreasonable, extortionate, and unjust, and that it was an unjust discrimination between shippers for the same service under like circumstances.

Before proceeding to a determination of what we regard as the material question in the case, we will first dispose of a question pertaining to the power of the referee. The petition in the case was twice amended after the cause was referred. The reference was made by agreement of the parties before any issue was made or tendered in the case. The order of submission was as follows: "By agreement of parties this cause is referred to D. Ryan, with power to settle issues, and try and hear the cause, and report the facts and conclusions of law." After the reference was made, the parties appeared before the referee, and the issues were made up. The amendments to the petition were very voluminous, and there were certain interrogatories attached to the petition, which interrogatories the plaintiffs demanded should be answered by certain persons claimed to be general officers of the defendant, and a rule was asked that the defendant be required to produce certain books and papers. In other words, the plaintiffs sought, by about all the means known to the law, to compel the defendant to disclose the facts as to the alleged discrimination between shippers. All these movements were resisted by the filing of motions and demurrers, attacking the pleadings, and by refusing to produce its books and papers, and by failing to make full answers to the special interrogatories, and for such failure the referee

ordered that the petition be taken as true, except so far as its averments were modified by the evidence introduced on the trial. It is claimed in behalf of the defendant that, under our practice, a referee has no power to make the orders which the referee made with reference to the failure to produce books and papers, and the failure to answer the special interrogatories. We do not think it is proper to determine what power a referee may have in these respects, for the reason that there is really not a disputed question of fact in the case. The evidence of the witnesses introduced by the plaintiffs establishes the facts pleaded in the petition without conflict. The defendant did not introduce any evidence; and, if the facts pleaded entitle the plaintiffs to recover, it would have been clearly against the undisputed evidence to have made a finding for the defendant. We will now state, as briefly as may be, the substance of the evidence.

It appears that one E. R. Clapp was an employe of the defendant. He was located at Des Moines, and was known among shippers of live stock as the Iowa stock-agent of the defendant. Clapp was frequently along the railroad in conference with shippers of live stock. He held this position during the time that the plaintiff made the shipments set forth in their petition. There were a number of shippers of live stock in and about Newton, the principal station on the defendant's road in Jasper county. During nearly the whole time covered by this action, the tariff rate for shipment of live stock from Newton to Chicago was sixty dollars per carload. It was practically the same from the stations next east and west of Newton. There was at times a slight difference, but not enough to be a material fact in the case. The freight charges, as given by the defendant to its station agents, were for the most of the time sixty dollars per carload, and this rate was given out by station agents to shippers as the charge made by the defendant. All of the carloads sent forward by all the shippers were billed by the agents at the full rate

given out by the company. The stock was shipped in the usual manner. No part of the freight charges were in any case paid at the place of shipment. The cars were billed to commission houses at the Union stock-yards. The stock was sold by the commission men, and, after taking out their commissions and paying the freight, the balance of the proceeds of the sales was remitted to the shipper. This was the uniform manner of transacting the business. All of the shippers were dealt with in exactly the same manner until the stock was sold, and the regular freight charges paid. There was no difference in the manner of the service. All of the shippers were given the same kind of cars, and the stock shipped by the plaintiffs was conveyed in the same kind of trains, and on the same time, and with the same privileges as to the free transportation of one or more men to take care of the stock while in transit. In short, the plaintiffs had no preference over other shippers in any respect. It appears without conflict that at least three other firms or individuals engaged in the same business at the same place, and in competition with the plaintiffs, had private and secret agreements with Clapp, the said stock agent, by which they were paid a rebate of from three to twenty dollars on each carload shipped. These agreements were not uniform at all times. The amount to be paid varied just as the parties were able to agree upon the terms. So far as appears, Clapp always performed the contracts. He paid the rebates sometimes in currency, at other times by sending the money to the shippers by express. There were short intervals during the time that no rebates were paid. But these intervals were the exception and not the rule. And Clapp always exacted a promise from the favored shippers that the fact of the payment of rebates must be kept secret. We have not made a careful estimate of the number of carloads shipped by the favored shippers. Indeed, no exact estimate could be made from the evidence. It is shown, however, beyond all question that not less than eighteen hundred

carloads, in the aggregate, were shipped by the favored shippers. The plaintiffs made application to Clapp for better terms, and were refused. He invariably stated in most positive terms that no rebates nor concessions were allowed to any of the plaintiffs' competitors. The referee found that the plaintiffs were entitled to recover on part of the shipments at the rate of three dollars per car, and on others at five dollars, and on the remainder at the rate of ten dollars per car. The aggregate amount found to be due, including interest, was twenty-seven hundred and thirty-three dollars and ninety-eight cents. If the plaintiffs are entitled to recover on the ground of unjust discrimination, the evidence shows beyond all controversy that the judgment is not excessive. Indeed, we do not understand appellant's counsel to claim that the judgment is excessive.

The real question in the case is, do the facts above recited authorize a recovery on the part of the plaintiffs? It is well to keep in mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable. In Story on Bailments, section 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood, Railway Law, 566, it is said: "A mere discrimination in favor of a customer is not unlawful, unless it is an unjust discrimination." In volume 2, page 95, Redfield on Law of Railroads, the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly

established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his prices. Hence, it was held at an early day that all that could be required on the part of the owner of the goods by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively." In Hutchinson on Carriers, 243, after a review of the cases, it is said: "Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty." An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates. It appears to be conceded that the defendant had no right to exact

unreasonable rates or to make unjust discriminations between shippers which in effect compels one shipper to pay an unreasonable rate.

The above principles of law may be said to be fundamental, and it is only necessary to apply the facts to reach the conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms-giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is that some of the others shipped less than the plaintiffs. In short, there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which shipments would ordinarily be made upon other railroads, but the evidence shows that the plaintiffs' field of operation was about the same as the other shippers. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. Is it to be supposed that any court or jury under this state of facts would solemnly find, declare and adjudge that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding that can in any fairness be made is that, after deducting the rebate, the rate was reasonable; and that the exaction from the plaintiffs was unreasonable, and the discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair-minded men. We have been cited to a number of adjudged cases, by counsel for the respective parties, and we think we may safely say that not one of them is in conflict with the views we have herein expressed upon this question.

On the contrary, and in support of our conclusion, see *Sharpless v. Mayor*, 21 Pa. St. 147; *New England Exp. Co. v. Maine Cent. Ry. Co.*, 57 Me. 188; *McDuffee v. Portland & Rochester Ry. Co.*, 52 N. H. 430; *Messenger v. Penn. Ry. Co.*, 36 N. J. Law, 407.

II. It is claimed in behalf of appellant that the payments by the plaintiffs were voluntarily made, and cannot be recovered back. It is true, the money was paid without duress of person or goods, but it was paid, not only without knowledge that it was a wrongful exaction, but in the belief of the truth of the positive assertions of Clapp that no shipper was allowed any rebate. That such a payment is not voluntary, see 1 Pars. Cont. 466, and *Heiserman v. Burlington, C. R. & N. Ry. Co.*, 62 Iowa, 732.

2. —: —: —: voluntary payment

III. The defendant pleaded the statute of limitations, as to part of the claim. The same question was considered in the case of *Carrier v. Chicago, R. I. & P. Ry. Co.*, 79 Iowa, 80, where it was held that the statute of limitations was no bar to the action. Following that case we hold that the statute did not commence to run while the plaintiffs had no knowledge of their rights in the premises, owing to the fraudulent concealment of the cause of action by the defendant.

3. —: —: —: —: limitation of actions.

IV. The defendant also appeals from an order overruling a motion to retax costs in the case. It appears that the sum of five hundred and eighty-two dollars was taxed as costs for copies of the petition and the several amendments thereto. It is shown by evidence taken on the hearing of the motion that the petitions and copies thereof were printed at an expense of not to exceed thirty dollars. The action of the court in taxing this erroneous item of costs was founded upon rule 1 of the rules of practice adopted by the convention of district judges, which went into effect July 4, 1887. The following is a copy of the rule: "Every

4. DISTRICT COURT RULES: COPIES OF PLEADINGS: EXCESSIVE FEES.

party at the time of filing any petition, answer, reply, demurrer or motion * * * shall file with the same one plain copy thereof for the use of the adverse party; and, on failure to do so, the same may be continued at the option of the adverse party, or the paper so filed stricken from the files. A fee of ten cents per hundred words shall be allowed for all copies, and taxed with the costs." Substantially the same rule was in force in some of the districts of this state for many years before it was adopted by the convention of judges. We are of opinion that such a rule of practice is valid, and that it was within the power of the judges to authorize costs to be taxed therefor, but it surely was not intended that the rule should be made an instrument of oppression. There is no requirement that a literal copy of all the pleadings should be made, when such pleadings are precisely alike, excepting, possibly, a date, an amount or the like. The purposes of the rule would have been fully subserved by a copy of one count, with a mere reference to the others. The court ought to have the discretion to prevent speculative and unnecessary costs. This item of costs will be reduced to fifteen dollars. The rule surely ought not to apply literally to petitions like this.

V. The plaintiffs also appealed from the judgment; but, if the judgment be affirmed on the defendant's appeal, they consent that it may be affirmed on their appeal. The judgment will, therefore, be affirmed throughout, with the exception as to the item of costs, as above mentioned. And as the defendant was successful on that branch of the appeal, twenty-five dollars of the costs in this court will be taxed to the plaintiffs; and the plaintiffs will also be taxed twenty-five dollars by reason of the affirmance of their appeal. These assessments appear to us, from an examination of the abstracts and arguments, to be about correct.
MODIFIED AND AFFIRMED.

THE STATE OF IOWA, Appellee, v. M. E. BILLINGS, Appellant.

Costs in Criminal Cases on Appeal. The expense of printing abstracts of the record in criminal cases under Acts, Twenty-first General Assembly, chapter 73, section 2, and of amendments to such abstracts when filed by the accused, for the use of the attorney general, is not taxable as part of the costs in the cause to be paid by the county wherein the accused was indicted, but should be paid by the state upon allowance by the executive council.

Appeal from Black Hawk District Court.

WEDNESDAY, OCTOBER 29, 1890.

PER CURIAM.—The grand jury of Bremer county returned an indictment against defendant, charging him with the commission of a felony. The place of trial was changed to Black Hawk county, and defendant was there tried and convicted. From the judgment of conviction defendant appealed to this court, and the judgment of the district court was reversed. In prosecuting his appeal, defendant prepared and filed in this court a number of printed copies of an abstract of the record, as required by the rules. The attorney general, believing that the abstract so presented was imperfect, caused to be prepared and printed copies of an additional abstract. Application is now made to us to tax the costs of printing the abstracts to the state, to the end that they may be paid by Bremer county.

We understand it to be conceded that there is no statute expressly requiring the payment of such costs as those in question, by the county liable for the costs of prosecution. But it is urged that such liability arises, by implication, from a fair construction of certain provisions of law which we will now consider. Section 2, of chapter 73, of the Acts of the Twenty-first General Assembly provides that, "in every criminal

case appealed from his county to the supreme court, he [the county attorney] shall, at least thirty days prior to the term at which the case is to be heard, prepare and deliver to the attorney general a properly prepared abstract of the case." Paragraph 4, of section 303, of the Code provides that the board of supervisors shall "examine, settle and allow all just claims against the county, unless otherwise provided for by law." Section 4386 of the Code is as follows: "The county in which the offense was committed, and from which the prosecution was transferred, shall pay all the costs attending the prosecution." It is claimed that the provision first quoted requires the county attorney to have the abstract printed; that the cost of printing is within the purview of the section last quoted; and that paragraph 4 of section 303 of the Code requires the board of supervisors to pay it as a just claim against the county. But a claim against a county is not just, unless the law either requires or authorizes its payment. *Foster v. County of Clinton*, 51 Iowa, 548; *Turner v. Woodbury Co.*, 57 Iowa, 440. We think it is clear that section 4386 was designed to relieve the county, to which a criminal cause should be transferred, from liability for costs of its prosecution, and to require their payment by the county in which the offense charged was committed, and from which the case was transferred. It was not designed to increase the items of taxable costs. When chapter 73 of the Acts of the Twenty-first General Assembly was enacted, and for many years prior to that time, it was the practice for the executive council to pay for the printing deemed necessary, on behalf of the state in prosecuting appeals to this court, in criminal cases. Section 150 of the Code requires the attorney general to prosecute and defend, for the state, criminal causes in the supreme court. Section 120 of the Code provides that the executive council shall procure for the offices of governor, attorney general and others certain specified supplies, and "any other thing necessary to enable such officers to promptly and efficiently perform the duties of their several offices;" also, that "the

accounts for any expenditures under this section, including repairs of the state house, and such other necessary and lawful expenses as are not otherwise provided for, shall be audited upon the certificate of such council, and the warrants drawn therefor paid by the treasurer of the state." The executive council claimed that the practice of paying for printing for the state, referred to, was authorized by the provisions of the Code last mentioned. Chapter 73 of the Acts of the Twenty-first General Assembly was enacted, we must presume, with knowledge of the established practice of the executive council in regard to criminal cases. It provides for the preparation of abstracts, in such cases, by the county attorneys, but makes no provision for the expenses of printing them. We, therefore, conclude that it was not the legislative intent to require the counties to pay such expense, but, rather, that the practice of the executive council should be continued, and we think this is so, whether the printing is done by virtue of an agreement made with the county attorney or the attorney general. In neither case can the county be made liable therefor, but, as the expense is necessary to enable the attorney general to properly prosecute or defend for the state, it may be allowed and paid by the executive council.

What we have said has no application to abstracts prepared and printed by defendants in criminal cases. It was decided in *Red v. Polk Co.*, 56 Iowa, 98, that a county is not liable for the cost of printing such abstracts, even though the defendant be discharged after a reversal of the judgment by this court. In *State v. Rainsbarger*, 74 Iowa, 540, it was held, that neither the county nor the state is liable for such costs. It follows from what we have said that, although the state should pay for printing the abstracts prepared by the county attorney, such payment should be made on application to the executive council, and that the expense of printing cannot be taxed as costs in this case. The motion to so tax them is, therefore, OVER-

JAMES L. LOMBARD, Appellee, v. CARRIE GREGORY *et al.*, Appellants.

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1. **Usury: MORTGAGE.** The retention by a lender of the sum of twenty-one dollars out of a loan of seven hundred dollars, evidenced by a note providing for the highest rate of interest allowed by law, will render the contract usurious.

2. ——: **FORECLOSURE OF MORTGAGE: DECREE.** In an action upon a note tainted with usury, and for the foreclosure of a mortgage given to secure the same, the payee will be entitled to judgment for the amount of the principal only, less the sum of all payments upon such usurious contract, and to a decree for the enforcement of his mortgage to such extent only.

3. ——: **FORFEITURE TO SCHOOL FUND.** Where usury is established in an action upon any contract, judgment will be rendered against the borrower, in favor of the school fund, in a sum equal to ten per cent. per annum upon the amount of the principal sum loaned, less the sum of all payments made under the contract.

Appeal from Montgomery District Court.—HON. A. B. THORNELL, Judge.

SATURDAY, NOVEMBER 29, 1890.

THIS is an action for the foreclosure of two mortgages upon certain real estate. There was a decree for the plaintiff, and defendants appeal.

Carrie Gregory and *H. R. Gregory*, for themselves.

D. H. Ettien and *Smith McPherson*, for appellee.

ROTHROCK, C. J.—I. On the twenty-second day of January, 1884, the defendants executed two mortgages to the plaintiff, to secure the payment of seven hundred dollars. One of the said mortgages was for the sum of seven hundred dollars, with interest coupons attached to the notes secured by the mortgage, by which defendants bound themselves to pay seven per cent. per annum interest in semi-annual installments. The other mortgage was for the

1. USURY: mortgage.

same loan, and represented three-per-cent. interest on the seven hundred dollars, so that the aggregate amount of interest which appeared to be contracted for was ten per cent. per annum. The defendants reside at the town of Villisca, where the mortgaged property is situated. Carrie Gregory appears to have been the owner of the property. The defendants were in debt, and there were liens upon the property and taxes due amounting to several hundred dollars. They were in urgent need of money, and applied to one Woodward, a resident of Villisca, to procure a loan for them. They executed a paper by which they agreed to pay Woodward a commission of twenty-five dollars if he should procure a loan of eight hundred dollars upon a mortgage upon the property. Woodward made an application to the plaintiff who caused an examination of the property to be made, and declined to make a loan in excess of seven hundred dollars. An additional loan was procured from another party, which was secured by a chattel mortgage. The two loans appear to have been sufficient to meet the requirements of the defendants.

It was provided in the mortgages to the plaintiff that they should become due if default at any time be made in the payment of interest on the loan, and it appears quite satisfactorily that such default occurred. The defendants set up the defense of usury. They also filed a cross-bill against said Woodward, and demanded an accounting of the money Woodward had received from Lombard for the notes and mortgages. And the additional loan of another party is attempted to be introduced in the case. It is unnecessary to further advert to these matters. The case was not one demanding an accounting. It was wholly unnecessary, and Woodward was neither a proper nor necessary party. He was the agent of the defendants in procuring the loan, and the plaintiff was not required to account for the money loaned. The defendants intrusted the disbursement of the money to Woodward, and had no

right to delay the foreclosure or embarrass it by a controversy between them and Woodward.

The only real question in the case is, was the contract, as between Lombard and the defendants, usurious? If the evidence shows that Lombard exacted any amount in excess of ten per cent. per annum, it was usurious. The evidence upon this question is not at all voluminous. It appears that the money was sent by draft by Lombard to Woodward, payable to the order of Carrie Gregory, with instructions that all liens must be removed from the property before the transaction was closed. Woodward paid off the liens with the proceeds of the draft, and with the money received on the chattel mortgage, and, on the sixth day of February, 1884, he rendered an account to Carrie Gregory, of which the following is a copy:

"Carrie Gregory in account with W. A. Woodward, 1884.

Feb. 6	F. P. Greenlee	$243 00		By Lombard draft.	$680 00
" "	W. H. Redmon	338 84		Feb. Treasurer	7 00
" "	M'tg recording	1 50		Feb. 6. By note and m'tg	150 81
	" "	1 25			
	Redeem tax sale	30 75			$837 81
	Tax up to 1883	47 14			
	Commission to Lombard	21 00			
	C. P. Squires	110 00			
	Commission	25 00			
	Commission on short loan to Royston	8 33			
	Recording m'tg	1 50			
	Making m'tg	2 00			
			$830 31		
Feb. 6	By commission on $150.81	7 54			
			$837 85		

"Received the above of W. A. Woodward, as our agent, in full this February 6, 1884.

"H. R. GREGORY,
"CARRIE GREGORY."

Now, while it is true this is an account rendered, and a settlement between Woodward and Carrie Gregory and her husband, yet the record before us shows that the plaintiff introduced it in evidence over the objection

of the defendants. It plainly appears therefrom that Lombard sent a draft for six hundred and eighty dollars, and retained a commission of twenty-one dollars, and this settlement was made some two weeks after the mortgage for seven hundred dollars was executed, delivered and recorded. The very fact that the draft was made for six hundred and eighty dollars, instead of for seven hundred dollars, shows unmistakably that Lombard took obligations from the defendants for the payment of the full amount of seven hundred dollars and ten per cent. per annum interest, and that he exacted an additional sum of twenty dollars or twenty-one dollars. The only evidence tending to contradict this statement is the testimony of Lombard, in which he admits that the draft was for the sum of six hundred and eighty dollars, but that afterwards the additional sum of twenty dollars was sent. His testimony upon this point in the case is as follows: "The application having been received, and the property examined, and deemed sufficient security for a loan of seven hundred dollars by a representative whom I sent from our Creston office, and the abstract of title submitted and passed on, the papers, namely, the notes and mortgages, were sent to Villisca to Mr. Woodward, as being the representative of defendants, that defendants might execute the same, and return them to me. A draft for the amount of the loan, less twenty dollars, was forwarded payable to the order of defendants, with instructions that it was to be delivered to the defendants when the incumbrances in the abstract had been removed, and when our mortgage had been filed for record, and the notes which the mortgage secured returned to me. Shortly after, the twenty dollars additional was sent, thus completing the full payment to the defendants of the seven hundred dollars."

This is all the evidence there is upon this question. Whether the additional twenty dollars was received by Woodward does not appear. It would seem, from his statement of account and settlement with the defendants, that it had not been received on the sixth

day of February, 1884, and there is no evidence that the defendants ever received it. The evidence shows that in the whole transaction they did not receive any money. It was all applied to the payment of liens and charges against the property. The mortgages were recorded on the twenty-fourth day of January, 1884. It will thus be seen that if Lombard paid the twenty dollars it was after the usurious contract was fully completed and in force, so far as it could be made operative by the acts of the parties. Another thought is of controlling importance. If Lombard did not intend to exact the twenty dollars in addition to the lawful rate of interest, why did he send a draft for six hundred and eighty dollars, and then in a "short time" make another payment of twenty dollars? This is contrary to all business methods, and Lombard is a business man. He testified, as a witness, that he is, by occupation, a money-lender, and it would seem to be important that he should have shown when he sent the additional twenty dollars, so that it might appear that both payments were parts of the same transaction.

II. It only remains to determine the amount to which the plaintiff is entitled to a judgment and decree of foreclosure. It is provided by statute that if it shall be ascertained on any suit brought on any contract that a rate of interest greater than ten cents on the one hundred has been contracted for, directly or indirectly, the plaintiff shall have judgment for the principal sum without interest. Code, secs. 2079, 2080. And, when payments have been made upon a usurious contract, such payments shall be applied as credits upon the amount legally due. *Smith v. Coopers*, 9 Iowa, 376. The amount of principal in this case was six hundred and eighty dollars, and the evidence shows that when this action was commenced the defendants had paid one hundred and twenty-three dollars and ninety-one cents thereon. The balance due the plaintiff is five hundred and fifty-six dollars and nine cents, for which the plaintiff is entitled to judgment and a decree of foreclosure.

2. ——: foreclosure of mortgage: decree.

III. It is further provided by statute that, in an action where usury is established, the court shall render judgment against the defendants, in favor of the school fund, for the amount of interest forfeited by the illegal contract, and that the forfeiture shall be ten cents on the one hundred by the year; and, where payments have been made upon a usurious contract in rendering judgment against the borrower in favor of the school fund, the amount upon which the interest should be computed should be ascertained by deducting the payments from the whole sum loaned. *Sheldon v. Mickel*, 40 Iowa, 19. Following this rule the judgment against the defendants in favor of the school fund will be for ten per cent. per annum on five hundred and fifty-six dollars from January 22, 1884. The plaintiff will not be allowed to recover costs nor the attorney's fees provided for in the notes. *Miller v. Gardner*, 49 Iowa, 234. The judgment and decree of the district court is REVERSED.

3. ——: forfeiture to school fund.

REPORTS

OF

CASES AT LAW AND IN EQUITY,

DETERMINED BY THE

SUPREME COURT

OF

THE STATE OF IOWA,

AT

DES MOINES, JANUARY TERM, A. D. 1891,

IN THE FORTY-FIFTH YEAR OF THE STATE.

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114 567
81 575
129 737

HENRY A. BARTON, Appellant, v. MARY E. FUSON *et ux.*, Appellees.

Trusts: ACCOUNTING: ESTOPPEL. A *cestui que trust* is not estopped from claiming an accounting with his trustee because of a receipt made to the latter acknowledging full satisfaction of the interest of the *cestui que trust* in the trust estate, and discharging the trustee from further liability therein, where the settlement in pursuance of which such receipt was made was based upon the false representations of the trustee, and the *cestui que trust* was ignorant of the real condition of the estate.

Appeal from Cass District Court.—HON. H. E. DEEMER, Judge.

TUESDAY, JANUARY 20, 1891.

THIS action was brought in chancery to foreclose a mortgage executed by the defendants upon lands which

subsequently they conveyed to other parties, who assumed to pay the mortgage debt. After answer and cross bill by defendants, the plaintiff dismissed his petition as to the defendants appearing in this appeal, and a decree was entered as to other defendants, and the case was tried upon the issues raised by defendant's cross bill and answer. A decree was rendered granting the relief sought by defendants. The plaintiff appeals.

L. L. De Lano, for appellant.

H. G. Curtis, for appellees.

BECK, C. J.—I. The defendant, Mary Fuson, being the owner of certain property, executed a mortgage to plaintiff and another to secure certain liabilities to them. A prior mortgage had been executed on the property to secure money borrowed of another party. The defendants conveyed the property to plaintiff and his associate creditor, under an agreement that these creditors should hold control of, and rent it until a purchaser could be found, when it should be sold, and the money realized should be applied to the payment of liens on the property, and the indebtedness and liabilities to plaintiff and his associates. The property was conveyed, the purchaser undertaking to pay the prior mortgage thereon; but, failing to do this, plaintiff acquired the prior mortgage executed by defendants, and brought this suit to foreclose it, joining with defendants, as a party to the suit, the purchaser from plaintiff. In defense to the action, so far as it seeks to hold defendants liable, and as the ground of a cross bill, they allege that plaintiff has failed to account for the money received by him from the property, and that the sum of five hundred dollars is unaccounted for, and due defendant, after payment of all liens and claims provided for by the agreement between the parties. The plaintiff denies the allegations of the answer, and alleges that he and defendant had a settlement of the transaction, and plaintiff paid the defendant, Mary Fuson, a

sum in full satisfaction and discharge of defendant's claim, and took a written receipt and discharge from her releasing plaintiff from all liability on account of any excess of the purchase price of the property over the liens thereon and debts of defendant to be paid by plaintiff.

II. In our opinion, the evidence shows that plaintiff failed to expend, under the agreement, an amount equal to the purchase price of the property. He surely fails to account for the amount he received for the property. We think the sum found by the district court, one hundred and fifty-seven dollars, if not more, remains in plaintiff's hands unaccounted for and unexpended; and that, under the agreement upon which the property was conveyed to him, he is bound to pay that sum to plaintiff.

III. In our opinion, the receipt or release ought not to estop defendants to require an accounting of plaintiff. He held the land as a trustee, and was required by the law to deal in the utmost good faith with defendants. He could not exercise his superior knowledge of the condition of the trust property, and the amount of debts against it, and conceal facts known to him, thereby inducing defendant to execute the release. We are not prepared to say that a trustee *in uberrima fides* may not settle with his *cestui que trust*, and accept binding acquittances and receipts discharging him from all liability on account of the trust estate. But, to make such a transaction binding, it must be based upon an accounting and a disclosure by the trustee of the condition of the trust. There must be no concealment of matters connected therewith, and the *cestui que trust* must not ignorantly assent to the settlement when he would not have done so had the trustee disclosed all the facts to him. In the case before us there was no accounting, no disclosure of the condition of the fund. Indeed, the property had not yet been sold. The evidence shows that defendant, when she executed the contract, relied upon the

representations of plaintiff as to the amount due her, and that these representations were not correct. The evidence shows that the sum found by the decree of the court below was due the defendants. In our opinion, the release is not binding upon defendants. We reach the conclusion that the decree of the district court ought to be AFFIRMED.

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81 578
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THE STATE OF IOWA, Appellee, v. HENRY MOORE, Appellant.

1. **Incest: EVIDENCE: RELEVANCY.** Upon a trial under an indictment for the crime of incest committed by a father with his daughter, evidence that the defendant had six years previous quarreled with his sons, and caused them to leave his house for causes having no relation to the commission of the crime, is irrelevant.

2. ——: ——: **INSTRUCTIONS: VERDICT.** A verdict of a jury that has been found against an instruction of the court will be set aside, even though such instruction contain an erroneous statement of the law.

3. ——: ——: **CORROBORATION OF PROSECUTRIX.** The sufficiency of corroborating evidence in such cases is for the jury to determine.

Appeal from Wayne District Court.—HON. R. C. HENRY, Judge.

TUESDAY, JANUARY 20, 1891.

THE defendant was indicted, tried and convicted of the crime of incest; and, his motion for a new trial being overruled, judgment was pronounced against him, from which he appeals.

Freedland & Miles and *W. H. Tedford*, for appellant.

John Y. Stone, Attorney General, for the State.

GIVEN, J.—I. On the trial the state was permitted to introduce testimony, over defendant's objection, showing that a difficulty occurred in 1879 between the defendant and his sons, then residing at home; that he told them to leave; and that they did so, and remained away. It is claimed on behalf of the state that the defendant drove the boys away, to make more convenient opportunity to commit the offense charged. This quarrel occurred more than six years before the time the crime is alleged to have been committed, and for causes then existing, that have no relation whatever to the commission of the crime. According to the prosecutrix's own statement, it was several months after the boys left that defendant first made improper proposals to her. There was no relevancy between this difficulty with the boys in February, 1879, and the commission of the crime charged, in September, 1885. Relevancy is that which conduces to the proof of a pertinent hypothesis. No circumstance is relevant which does not make more or less probable the proposition at issue. 1 Whart. on Evidence, sec. 20. We think the court erred in overruling the defendant's objection to this testimony, and that its admission was prejudicial to him.

1. INCEST: evidence: relevancy.

II. The indictment charges that the crime was committed in September, 1885. The only testimony as to the time it was committed is that of the prosecutrix, and date of the birth of her child. She gives the date of their first intercourse as September 22, 1885, and the second and only other intercourse as occurring about a week after the first. The child was born March 24, 1886. There was no testimony whatever from which to find that the crime was committed later than the first days of October, 1885. The court instructed the jury that, to convict, they must find beyond a reasonable doubt that "within three years prior to the finding of the indictment, which finding was on the twelfth day of January, 1889, the defendant and the said Theresa Moore carnally

2. ——: ——: instructions: verdict.

knew each other." It was the duty of the jury to accept this instruction as the law, and to be governed by it. This being the law of the case, there was no evidence upon which to convict under it, as the undisputed testimony is that the crime was committed more than three years before the finding of the indictment.

The testimony shows that the defendant was a non-resident of this state during a part of the three years preceding the finding of the indictment, but the instructions are silent as to that fact. In *Way v. Railway Co.*, 73 Iowa, 468, it is said: "We will not inquire whether the instruction is correct or not. It was given as the law of the case, and should have been respected by the jury. A verdict which has been found against the instructions of the court should be set aside, even though the disregarded instructions should be erroneous." "The instructions, whether right or wrong, constitute the law of the case, and it was the duty of the jury to follow them." *Crane v. Railway Co.*, 74 Iowa, 334. See, also, *Browne v. Hickie*, 68 Iowa, 330; *Griffith v. Railway Co.*, 72 Iowa, 645; *Musser v. Maynard*, 59 Iowa, 11; *Stewart v. Smith*, 60 Iowa, 275; *State v. Adams*, 78 Iowa, 292. The verdict is not in accordance with the law as given by the court and the evidence.

III. It is contended on behalf of appellant that Theresa Moore is not corroborated by other evidence tending to connect the defendant with the commission of the offense. The court instructed that such corroboration was necessary to convict. We are not called upon to say whether the provisions of section 4560 of the Code apply to prosecutions for incest or not; but only to determine whether there is other evidence tending to connect the defendant with the commission of the offense, than that of the prosecuting witness. On March 8, 1888, the prosecuting witness wrote to the defendant, threatening him with indictment if he did not give her five hundred dollars. On March 14, following, he wrote to her a letter abounding in warnings. It is unnecessary that we state the contents of that

s. —: —: corroboration of prosecutrix.

letter. It is sufficient to say that, unexplained, it tends to corroborate the prosecuting witness in her testimony connecting the defendant with the commission of the crime charged. It is the province of the jury to say in how far the defendant's statements are explained upon any other hypothesis than his guilt, and what weight should be given to the testimony introduced as corroborating.

It is unnecessary that we notice other questions discussed, as they will not arise on retrial. For the errors mentioned, the judgment of the district court must be REVERSED.

WILLIAM JOHNSON, Appellee, v. H. Z. WEBSTER, Appellant.

1. **Practice**: APPEAL: RECORD. Where, in an action commenced as at law, a motion is made to transfer the same to the equity side of the calendar, but the record fails to show any ruling upon such motion nor that the maker of said motion asked that a record be made of the ruling thereon, nor that the cause was thereafter treated as in equity, nor that equitable relief was granted by the trial court, it will be presumed by the supreme court that the motion to transfer was not ruled upon by the trial court but was abandoned by the maker.
2. **Promissory Note**: JUDGMENT: PAYMENT BY INDORSER: ASSIGNMENT. Judgment having been rendered against the maker and indorser of a promissory note, money from the indorser sufficient to satisfy the same was placed in the hands of W. under an agreement that he should obtain an assignment of the judgment to himself, and then assign the same to the plaintiff. W. obtained an assignment of the judgment, but instead of assigning the same to plaintiff he assigned to one N., who received payment of the judgment from the maker of the note, and satisfied the same of record. At the time of the assignment to N., he and the maker of the note knew that W. had no interest in the judgment, and that he was under obligation to assign the same to the plaintiff. *Held*, that the plaintiff, having received from the indorser an assignment of his interest in the judgment, was entitled to recover of the maker the amount paid by the indorser, but not exceeding the sum necessary to satisfy the judgment.
3. **Practice in Supreme Court**: ASSIGNMENTS OF ERROR. Assignments of error upon appeal which are not argued by counsel will not be considered by the supreme court.

Appeal from Audubon District Court.—HON. A. B. THORNELL, Judge.

TUESDAY, JANUARY 20, 1891.

ACTION to recover the amount of a judgment against defendant and others alleged to have been paid by the assignor of plaintiff. There was a trial by the court, and a judgment in favor of plaintiff. The defendant appeals.

Theo. F. Meyers and *John M. Griggs*, for appellant.

Benj. I. Salinger, for appellee.

ROBINSON, J.—On the thirteenth day of February, 1882, the defendant and others gave to one William Pickerell their promissory note for one hundred and ninety-nine dollars with interest at ten per cent. per annum. Pickerell indorsed the note to Charles Van Gorder, who on the twenty-third day of February, 1883, obtained judgment thereon against the makers and Pickerell, as indorser, for the sum of two hundred and fifteen dollars and fifty-five cents, attorneys' fees and costs. The judgment was rendered by a justice of the peace, and a transcript thereof was filed in the office of the clerk of the circuit court of Audubon county on the twenty-sixth day of February, 1883. The filing of the transcript created a lien upon certain land owned by William Pickerell. He afterwards conveyed the land to his wife, Millie E. Pickerell, and she conveyed it to John Martin. Martin gave to Mrs. Pickerell a mortgage on the land to secure the payment of fourteen hundred and sixty dollars. The mortgage thus given provided that it should not become due until all other liens and incumbrances upon the land should be removed. In January, 1884, the mortgage and note thereby secured were assigned to plaintiff. In February of that year, money belonging to William Pickerell was placed in the hands of S. L. Wilson, as the agent of plaintiff and Martin, sufficient in amount to satisfy the judgment in favor

of Van Gorder for the purpose of obtaining an assignment of the judgment, and the note and mortgage were surrendered to Martin. The plaintiff claims, and the evidence tends to show, that by virtue of the agreement between Martin Wilson and the plaintiff, Wilson was to obtain an assignment of the judgment to himself; that he was then to assign it to plaintiff; and that so far as it was a lien on the Pickerell land it was to be released. Wilson obtained an assignment of the judgment to himself in February, 1884, and by authority of plaintiff released the Pickerell land from its effect; but, instead of then assigning it to plaintiff, he, on the, seventh day of May, 1885, assigned it to one M. Nichols. On the next day Nichols acknowledged receipt from defendant of the amount required to satisfy the judgment. In the spring of 1886 Pickerell assigned to plaintiff his claim against defendant for money paid by Pickerell on account of the judgment, and this action is brought to recover the amount of that claim.

I. After the cause was submitted to the court, the plaintiff moved to set aside the submission, and for leave to amend his petition and introduce additional evidence, and to transfer the cause to the equity side of the calendar. The record does not show any ruling upon the motion, but it appears that the submission was set aside, and that plaintiff filed an amendment to his petition in equity. There is nothing to show that the cause was thereafter treated as in equity, and no equitable relief was given. In this condition of the record we cannot presume that the cause was transferred to the equity docket. An error assigned by appellant, but not argued, is that the court erred in not making a record as to whether the cause was transferred to the equity docket; but it does not appear that he asked that such a record be made, and we will presume that the motion to transfer was not ruled upon, but was abandoned by plaintiff. We refer to the condition of the record to show that the cause is not triable here *de novo*, but that it will be treated as an action triable by ordinary proceedings, and the finding

1. PRACTICE: appeal: record.

of the court be given the force and effect of the verdict of a jury.

2. PROMISSORY note: judgment: payment by indorsee: assignment.

II. The appellant contends that he paid the amount due on the judgment to Nichols in good faith, and without knowledge of the rights of the plaintiff and Pickerell. The evidence as to that is conflicting. The plaintiff testifies positively that he conversed with Nichols and defendant several times before the assignment was made to Nichols, and that during those conversations he disclosed his interest in the judgment, and that Wilson had no interest in it and no authority to assign it to anyone but plaintiff, and exhibited the written obligation of Wilson to assign to plaintiff. Nichols was the attorney of defendant. We are of the opinion that the court was justified in finding that both defendant and Nichols knew before the judgment was assigned to the latter that Wilson had no interest in the judgment which he could assign to them. If that was the case defendant could not discharge his obligation to Pickerell by paying the amount of the judgment to Nichols. It is true the payment made for Pickerell was nominally for an assignment of the judgment to another person, but as to parties having knowledge of the facts involved in the transaction it was in effect a satisfaction of the judgment as to Pickerell, and gave him a right to recover of defendant the amount required to satisfy the judgment. Whether he could have enforced that right by an action against defendant before the judgment in controversy was satisfied, we need not determine. The judgment was satisfied of record by the unauthorized payments of defendant, and Pickerell and his assignee may treat it as satisfied in fact, and recover the amount paid by Pickerell not exceeding the sum required to satisfy the judgment. That the amount allowed by the district court is correct, if defendant is liable, is not questioned.

3. ASSIGNMENTS of error.

III. Other errors are assigned by appellant but not argued, and, therefore, do not require further notice. The judgment of the district court is AFFIRMED.

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THE STATE OF IOWA, Appellee, v. ED. BRIGGS, Appellant.

1. **Liquor Nuisance: EVIDENCE: INSTRUCTION.** In a prosecution for maintaining a nuisance by selling intoxicating liquors upon certain premises described in the indictment, it appeared that the defendant, upon receipt of money therefor, issued orders for such liquors at his blacksmith shop, which were inclosed, with the money received, in an envelope, which being presented at a depot two blocks away the purchaser would receive the liquors called for by the order. *Held*, that, in view of the above evidence, an instruction to the jury, that if they found that the defendant "gave to any person any order by means of which he procured liquors of the character described in the indictment from the express office, or any other building, and that he received the money for such liquors at his blacksmith shop, substantially as charged in the indictment, this will be evidence that you may consider in determining, whether or not the defendant is guilty," was not erroneous.

2. ——: ——: ——. An instruction in such case, that it is "unlawful to give away any intoxicating liquor to be used as a beverage," is erroneous.

Appeal from Jasper District Court.—HON. D. RYAN, Judge.

WEDNESDAY, JANUARY 21, 1891.

INDICTMENT for maintaining a nuisance by selling, and keeping with intent to sell, intoxicating liquors. There was a verdict of guilty and judgment, from which defendant appealed.

H. S. Winslow, for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the State.

GRANGER, J.—I. The place sought to be established as a nuisance was a blacksmith shop kept by defendant.

1. LIQUOR NUISANCE: EVIDENCE: INSTRUCTION.

The undisputed evidence shows that the defendant, at this shop, gave away intoxicating liquor, and there is testimony tending to show that on one occasion he sold it at that place. There is also testimony that the defendant gave orders at the shop for liquor to be received at the depot, some two blocks away. Little square envelopes were kept, in which the order for the liquor was put, and the money also, which, as we understand, would be delivered at the depot, and the liquor received. The district court gave the following instruction, of which complaint is made: "If you find from the evidence, beyond a reasonable doubt, that the defendant, in this county and state, within three years next prior to the finding of the indictment in this case, in a certain building, substantially as charged in the indictment, *gave to any person any order by means of which he procured liquors of the character described in the indictment from the express office, or any other building, and that he received the money for such liquors at his blacksmith shop, substantially as charged in the indictment, this will be evidence that you may consider in determining whether or not the defendant is guilty of selling, or keeping for sale, intoxicating liquors, as charged in the indictment.*"

The italicized portion is that to which criticism is directed. Under the testimony in the case, the instruction is not erroneous, nor is the testimony on which the instruction is based improper. With the conflict in the evidence as to the fact of the defendant being engaged in selling liquors in his shop, the fact that he was there receiving money, and giving orders for liquors to be delivered elsewhere, would show that he was selling intoxicating liquor, and using the shop for that purpose, that being the place where the business was transacted. Without holding that a sale in one place, and a delivery in another, would make the place where the sale was made a nuisance (which question we in no manner determine), we do say that it was proper to show the use to which the shop was put in connection

with the keeping and sale of liquors, as bearing on the question whether or not it was being maintained as a nuisance. Surely, the fact that the defendant was in the business of selling liquors would strengthen a belief from the evidence that the shop was being used for the sale of liquors kept therein.

2. THE SAME.

II. Complaint is also made of the following instruction given by the court: "In this state no person may sell, directly or indirectly, any intoxicating liquors, unless he shall have a permit so to do, and the keeping of intoxicating liquor with such intent on the part of the owner thereof, within this county, without such permit, is prohibited by law. It is also unlawful to give away any intoxicating liquor to be used as a beverage." The instruction is erroneous. From it, under the evidence, the jury must have understood that if the defendant, in his shop, gave to any person a drink from a bottle kept for his private use (which he admits he did), the act would be unlawful. There could be no appropriate use of the word "unlawful" in this connection, except that it was unlawful for the purpose of this case, which would be that the giving would constitute the place a nuisance. That it would not, see *State v. Hutchins*, 74 Iowa, 20. If we are mistaken in our view of the purpose of the instruction, we are still unable to discover how it can be legitimate to the issues, and it is surely misleading. There are other questions presented that we think not likely to arise on another trial, and we do not consider them. REVERSED.

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THE STATE OF IOWA, Appellee, v. P. C. KING, Appellant.

1. **Embezzlement**: INDICTMENT: DUPLICITY. An indictment charging one with embezzlement of public funds, received by him as county treasurer, "by expending the same in his private business, and by permitting persons, whose names are to the grand jury unknown, to use and expend said money in their private

business transactions, and by using said money to pay his own private debts," is not bad for duplicity, as charging three distinct offenses, nor is it ambiguous because the amount appropriated by each of the methods of the conversion is not stated, but the matter so alleged is mere surplusage.

2. ———: JURY: CHALLENGE FOR CAUSE. The rule announced in *State v. Vatter*, 71 Iowa, 557, and *State v. Munchrath*, 78 Iowa, 268, in relation to the right to challenge a juror for cause who has formed or expressed an opinion as to the guilt or innocence of the defendant in criminal cases, adhered to.

3. ———: EVIDENCE. Where an indictment for embezzlement alleges the various purposes to which the funds converted were used, proof of such allegations is not necessary to a conviction.

4. ———: ———. The introduction of the record of the board of supervisors in such case to show the report of the defendant as treasurer, *held*, to be without prejudice, when the report itself was afterwards introduced in evidence.

5. ———: ———. After the board of supervisors had made demand upon the defendant for a settlement of his accounts as treasurer, and time had been given him to write up his books, and he had been urged by the board from time to time to produce the money that should be in his custody, the defendant tendered some money and bank drafts necessary to make up the amount, but the board refused to receive the drafts as money, and again defendant produced the proper amount of money, but the board refused to settle with him, because he demanded that the money be immediately returned to him. When defendant was finally removed from office, he was found to be in default in the sum of over twenty thousand dollars, and no explanation of the defalcation was made upon the trial. *Held*, that the charge of embezzlement was supported by the evidence.

Appeal from Taylor District Court.—HON. R. C. HENRY, Judge.

WEDNESDAY, JANUARY 21, 1891.

THE defendant was tried and convicted upon an indictment for the crime of embezzlement, and he appeals.

L. T. McCoun, for appellant.

John Y. Stone, Attorney General, and *Geo. F. Henry*, for the State.

ROTHROCK, J.—I. The defendant was treasurer of Taylor county for several years prior to the year 1884. He was removed from the office by the board of supervisors of the county on the second day of August of that year. At the time of his removal, he paid over to his successor, of the public funds in his hands, the sum of two hundred and sixteen dollars and eighty-one cents, and failed to pay or account for about twenty-seven thousand dollars, which had been in his hands as treasurer. Because of his failure to account for and pay over said money, he was indicted for the crime of embezzlement. The charging part of the indictment is as follows: "That he, said King, did then and there, unlawfully and feloniously embezzle and convert to his own use, without authority of law, the sum of twenty-seven thousand, five hundred and fifteen and sixteen-hundredths dollars of the public moneys of said county, and which said money came into his hands by virtue of his office of treasurer, as aforesaid. The said defendant did, as aforesaid, then and there unlawfully and feloniously, and without authority of law, convert said money to his own use, by expending the same in his private business, and by permitting persons, whose names are to this grand jury unknown, to use and expend said money in their private business transactions, and by using said money to pay his own private debts, so that said sum of twenty-seven thousand, five hundred and fifteen and sixteen-hundredths dollars of the public moneys of the said county of Taylor, which came into the hands of the defendant by virtue of his office as treasurer, aforesaid, was then and there, and is now, wholly lost to said county, and the said defendant then and there wholly failed to account for the same, and said sum of money is now wholly unaccounted for, contrary to law."

1. EMBEZZLEMENT: indictment: duplicity.

It is claimed that the indictment is fatally defective, because it charges that the defendant expended the money in his private business, and by permitting

others to expend it in their private business, and by using the money in paying defendant's private debts. It is claimed that each one of these acts charged a separate offense, and that, as but one offense can be charged in an indictment, a motion in arrest of judgment should have been sustained, because the indictment is bad for duplicity. It is further claimed that the indictment is ambiguous, because it does not state how much of the money was used by King in paying his private debts, and how much for the other purposes named. In support of this contention reliance is had upon the case of *State v. Brandt*, 41 Iowa, 610. That case is not authority upon this question In so far as the question was involved in that case, the court was equally divided in opinion, and it may well be doubted whether the question, now presented, was in the cited case. The question there appears to have been whether an indictment charging the crime in the language of the statute was sufficient. In the case at bar the complaint is that the indictment charges too much, in that it sets out three different modes in which the defendant appropriated the money, and does not describe these methods of appropriation with sufficient certainty. We are of opinion that the indictment is sufficient. The gist of the offense is the wrongful conversion of the public money, and it is wholly immaterial and mere surplusage to state whether the defendant used it in paying his debts, in purchasing property, had it on deposit in bank, carried it on his person, or loaned it to others, and the fact that three different modes of concealing the money are set forth in the indictment is wholly immaterial.

II. The defendant challenged two jurors for cause, on the ground that they had formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent them from rendering a true verdict upon the evidence submitted on the trial. These challenges were overruled We have examined the proceedings had in

2. —: jury: challenge for cause

relation to the objection to these jurors. Their examination, under oath, as to their qualifications, is fully set forth by question and answer in appellee's abstract, and our conclusion is that there was no error in overruling the challenges. It is unnecessary to set out the proceedings at length. The ruling of the court is fully sustained by the cases of *State v. Vatter*, 71 Iowa, 557, and *State v. Munchrath*, 78 Iowa, 268.

3. ——: evidence.

III. The evidence did not tend to show the manner in which King disposed of the money for which he failed to account. It is urged that it was necessary to prove that it was disposed of in the manner alleged in the indictment. This appears to us to have been wholly unnecessary. Embezzlement is a species of larceny, and, if an indictment for larceny of goods should aver that the goods were taken and removed in a wagon, on a horse, or in any other manner, it would be wholly immaterial. Proof that the goods were taken and carried away in any manner would be sufficient.

4. THE same.

IV. The state introduced the record of the board of supervisors to show the report of the defendant as treasurer. It is claimed that the record was erroneously admitted, because it was secondary evidence. Whatever of merit, if any, there may be in this objection, there was no prejudice to the defendant, for the reason that the report itself was afterwards introduced in evidence.

Other questions as to rulings upon the admission and exclusion of evidence need not be specially mentioned. They all relate to matters pertaining to the record of the board of supervisors, and to conversations and transactions between the board and defendant touching a settlement and accounting for the funds in the defendant's hands. In view of the facts which are practically conceded in the case, these rulings were no prejudice to the defendant, and we may say here, that the objections to the refusal to give instructions to the jury requested by the defendant, and the alleged errors in the instructions given by the court to the jury, are

all without merit. The court in all these rulings evidently followed the case of *State v. Bryan*, 40 Iowa, 379, where it is said that, "the crime with which the defendant is charged consists in receiving the money as treasurer, and in converting it to his own use. Whatever will establish these facts will prove the defendant's guilt. That he received the money is proved, and not disputed, and the proof of a demand and refusal was distinctly made, and is not controverted, and this is evidence of conversion. The defendant might have shown an excuse for his refusal, such as that the bank with which he had deposited the money had failed; that he had been robbed of it; that the house where he kept it was burned, and the money with it; that he had invested it in government bonds, and could not pay until he could send them to market," etc.

5. THE same.

V. The evidence in this case shows, beyond all question, that the board of supervisors demanded a settlement with the defendant as treasurer at their regular meeting in June. King asked time to prepare for a settlement, and the board gave him until June 20 to write up his books and make ready for a settlement. No settlement was made at that time. The board kept meeting and adjourning, and pressing King to produce the money which should have been in his custody. He at one time produced some money and bank drafts necessary to make up the amount. The board refused to receive the drafts as money. At another time King produced the proper amount in money, but the board refused to settle with him because he demanded that the money be immediately returned to him. The sequel shows that the board of supervisors did its duty in refusing to receive the drafts and money upon the terms proposed by the defendant, because, when King was removed, on the second day of August, 1884, he paid over to his successor about two hundred dollars, and was a defaulter in the sum of over twenty thousand dollars. He made no explanation of how or in what manner he used the

money. The money was lost to the county. This showing established the crime of embezzlement, and the jury could not properly have found any other verdict than that the defendant was guilty.

The judgment of the district court is AFFIRMED.

THE STATE OF IOWA, Appellee, v. ELIAS ADAMS, Appellant.

1. **Liquor Nuisance**: VENUE: PRACTICE. Forty days after indictment, and upon the eleventh day of the following term of court, and after his case was called for trial, the defendant filed a motion for a change of venue on the ground of prejudice, supported by his own affidavit, and those of three other persons. The next morning the state filed counter-affidavits of eleven persons, and the defendant asked until two o'clock in the afternoon to file additional affidavits. *Held*, that, no excuse for defendant's delay in making the application being shown, there was no abuse of discretion by the district court in refusing to grant defendant's request for additional time.

2. ———: INDICTMENT: JURISDICTION. The use of premises for the purpose of selling, and selling therein, intoxicating liquors prohibited by law, is an indictable offense under Code, section 1543, and upon a first violation of the provisions thereof, and is, therefore, within the jurisdiction of the district court.

3. ———: JUDGMENT. Upon a conviction under an indictment for maintaining a liquor nuisance upon certain prescribed premises, a judgment ordering the destruction of the liquors found upon the premises in controversy, and the removal and sale of all fixtures, furniture, vessels, and all moveable property used in, or about, the premises in carrying on the unlawful business, and that the building be closed, as against its use for saloon purposes, for the period of one year, unless sooner released as provided by law, is authorized by Acts, Twenty-first General Assembly, chapter 66, section 5.

Appeal from Muscatine District Court.—HON. W. F. BRANNAN, Judge.

WEDNESDAY, JANUARY 21, 1891.

DEFENDANT was indicted for the crime of nuisance, committed by using certain premises for the purpose of selling therein, and by selling therein, intoxicating

liquors in violation of law. He was tried, found guilty, and adjudged to pay a fine of three hundred dollars and an attorney's fee of twenty-five dollars and costs. It was also adjudged that the nuisance be abated, as provided by section 5, chapter 66, of the Acts, Twenty-first General Assembly. From that judgment he appeals.

D. C. Cloud, for appellant.

No appearance for the State.

ROBINSON, J.—I. Appellant complains of the refusal of the court to grant his petition for a change of venue to another county. The indictment on which defendant was tried was presented by the grand jury on the twenty-third day of September, 1889. The defendant was arrested, and on the twenty-sixth day of that month gave bond for his appearance at court to answer the indictment. On the second day of December, 1889, that being the eleventh day of the November term of court, this cause was called for trial. The defendant, not being in court, was sent for, and came into court with counsel, and a petition for a change of venue based on the alleged ground, that he could not receive a fair and impartial trial on account of prejudice against him in the county. The petition was verified by defendant only when he entered the court room, but he there obtained verification by three other persons and filed it. Thereupon the state asked for time until the next morning in which to present counter-affidavits, and the request was granted. On the following morning the counter-affidavits of eleven persons had been filed. Defendant then asked until two o'clock in which to file additional affidavits in support of his petition, but the court refused to give him further time, under the circumstances. The record discloses no reason for the delay of defendant in making application for the desired change, and the court may fairly have concluded that it was without merit, and made to delay the trial. We discover no abuse of the discretion lodged in the district court in denying

1. LIQUOR NUISANCE: VENUE: PRACTICE.

the application for additional time in which to present affidavits, and in denying the petition for a change of venue.

II. Appellant contends that the district court acted without jurisdiction of the case. His claim is that the offense with which he is charged is the selling of intoxicating liquors without a permit, contrary to the provisions of section 1540 of the Code, as amended, or the owning or keeping of such liquors with the intent to sell the same in violation of law, contrary to the provisions of section 1542 of the Code, as amended; that, in either case, a trial for the first offense is within the jurisdiction of a justice of the peace, and it does not appear that he has been guilty of a second offense. But it clearly appears that the indictment was found under the provisions of section 1543 of the Code, as amended. It charges that defendant used the premises described for the purpose of selling therein, and that he did sell therein, intoxicating liquors prohibited by law. Under the section last specified an indictment may be found for the first offense. *State v. Howorth*, 70 Iowa, 158. The district court, therefore, had jurisdiction of the case.

2. —: indictment: jurisdiction.

III. Appellant insists that the district court exceeded its powers in ordering the destruction of the liquor found in the premises in controversy, in ordering the removal therefrom, and sale of all fixtures, furniture, vessels, and all movable property used in or about the premises in carrying on the unlawful business, and ordering the closing of the building as against its use for saloon purposes, and the keeping of it closed for the period of one year unless sooner released, as provided by law. The judgment complained of was fully authorized by section 5 of chapter 66 of the Acts, Twenty-first General Assembly, and the power of the general assembly to enact so much of that section as is now in question was affirmed in *Craig v. Werthmueller*, 78 Iowa, 603. The power of the court to order the abatement of a nuisance is not peculiar to cases involving the illegal sale of intoxicating liquors.

3. —: judgment.

Section 4092 of the Code provides that "whoever is convicted of erecting, causing or continuing a public or common nuisance * * * shall be punished by a fine not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided." Sections 4093, 4094 and 4096 contain further provisions for the abatement of nuisances at the cost of the persons adjudged to be guilty of them. In *State v. Mullen*, 35 Iowa, 199, the defendant was convicted of the crime of nuisance committed by keeping a house of ill fame in a boat upon the Mississippi river. A judgment imposing a fine upon the defendant, and ordering the abatement of the nuisance and sale of the boat, was sustained. The assertion of appellant that the property was "confiscated" is not correct. The judgment provided that the proceeds of the sale of the personal property should be used to pay the costs of the action and abatement, and in satisfaction of the fine and costs adjudged against defendant, and that the balance, if any, remaining should be paid to him, and was authorized by section 6, chapter 66, Acts, Twenty-first General Assembly. The closing of the building for one year was a consequence of the unlawful acts of defendant designed to secure the enforcement of the law.

We discover nothing in the record which justifies a reversal of the judgment of the district court. It is, therefore, AFFIRMED.

THE STATE OF IOWA, Appellee, v. GEORGE PAUL, Appellant.

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1. **Trespass**: INDICTMENT: DUPLICITY. An indictment for trespass that charged the accused with cutting down and carrying away growing trees from two separate tracts of land, the property of persons named, is not bad as charging two separate offenses, if the cutting upon both tracts was a single transaction.

2. ——— : ——— : ———. Neither is such indictment subject to the charge of duplicity, under Code, section 3983, because it alleges that the accused both cut *and* carried away trees from said land, if the cutting and carrying away were parts of the same transaction.

3. ——— : ——— : OWNERSHIP OF LAND. In such an indictment an allegation, that the land described belonged to the "Estate and heirs of Madison Young, deceased," sufficiently alleges the ownership of said land.

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

WEDNESDAY, JANUARY 21, 1891.

INDICTMENT for wilful trespass on land of another. The charging part of the indictment, as set out in the abstract, is as follows: "The said George Paul, on the twentieth day of December, 1888, in the county aforesaid, did then and there wrongfully, unlawfully and wilfully cut down a large number of standing and growing trees, the exact number thereof being to the grand jury unknown, the same then and there being the property of another or others, to-wit, the property of the heirs of one Madison Young, deceased, the same being then and there standing and growing upon the land belonging to the estate of said Madison Young, deceased, and to the said heirs of said estate, the said land on which said trees were standing and growing being described as follows, to-wit: 'The southwest quarter of the northeast quarter of section number twenty-two (22), and the southeast quarter of the northwest quarter of section number twenty-six (26), and lots number four (4), five (5) and six (6), in section number twenty-six (26), all being in township number eighty-seven (87), range number twenty-seven (27), west principal meridian, Webster county, Iowa.'" And, as descriptive of the offense charged, it is alleged that he, "the said defendant, did then and there carry and haul away from said premises the said trees and timber so cut down as aforesaid, which said trees and timber were then and there the property of said estate, and of the value of more than two

hundred dollars ($200), the exact value thereof being to the grand jury unknown, and that the same was cut down without the consent of the owners of said land, or said trees."

R. M. Wright, for appellant.

John Y. Stone, Attorney General, and *C. H. More*, for the State.

GIVEN, J.—I. It will be observed that the two forty-acre tracts from which it is charged trees were cut and taken are in different sections, and not contiguous. Appellant claims that cutting trees on each constitutes separate offenses, and, therefore, the indictment charges two offenses. If cutting the trees was but one transaction, then it constitutes but one offense. That it was upon different tracts of land does not make it separate offenses, any more than the cutting of each tree was a separate offense. If, in point of time and circumstances, the cutting was done as a single act, then it is but one offense. The charge, fairly construed, is that, at a single time and as a single act, the defendant cut down trees growing on the land described.

1. TRESPASS: indictment: duplicity.

II. Section 3983 of the Code provides: "If any person commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another, or by carrying away timber or wood being on such land, * * * he shall be punished," etc. Under this statute the offense may consist in wilfully cutting, or wilfully destroying or wilfully carrying away, but it does not follow that a single trespass may not be committed by cutting, destroying and carrying away. To cut without destroying or carrying away is an offense; so to destroy without carrying away, or to carry away without cutting. It is none the less a single offense if, as one transaction, the accused both cut and carried away, as is charged in this indictment.

2. THE same.

III. Appellant contends that the indictment fails to give the names of the owners of the land on which the trespass is alleged to have been committed. The lands are described as belonging to the estate and heirs of Madison Young, deceased. It is argued that, as it does not appear whether Madison Young died testate or not, we cannot say but that one tract belonged to one heir, another to another, and so on, each tract having a separate owner. No such inference is warranted. The statement is that it belongs to the estate and heirs, which precludes the inference of separate ownership.

8. —: —: ownership of land.

We do not discover any errors in the proceedings of the district court, and its judgment is, therefore, AFFIRMED.

THE STATE OF IOWA, Appellee, v. W. H. HARDING, Appellant.

Practice in Criminal Cases: ORAL INSTRUCTIONS. **The defendant was indicted for an assault with intent to commit murder. After the jury had deliberated upon their verdict, they returned into court and requested further instructions. Thereupon the court questioned the jurors as to their points of difference, and orally instructed them as to the difference between an assault with intent to commit murder and an assault with intent to commit manslaughter; which instructions were taken down in shorthand by the reporter, and, upon the notes being extended, were delivered to the jury. Before the jury received said instructions in writing, however, they had agreed upon a verdict, but were directed to wait for the written instructions. After the instructions were received in writing by the jury, and after the same had been read, a vote was taken, and the verdict previously found adhered to. *Held*, that the action of the court was contrary to the provisions of Code, sections 4420, 4440 and 4441, requiring that instructions to the jury in criminal cases be in writing.**

Appeal from Washington District Court.—HON. D. RYAN, Judge.

THURSDAY, JANUARY 22, 1891.

THE defendant was indicted for assault with intent to commit murder. There was a verdict for an assault with intent to commit manslaughter, and, from a judgment thereon, the defendant appealed.

Dewey & Eicher and *E. W. Tatlock*, for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the State.

GRANGER, J.—After deliberating more than eighteen hours, the jury sent to the court the following: "There are two men that will not vote guilty on the second count, but say that, if you will send them written instructions, that such a verdict will be in accordance with the evidence and your instruction, that they will so vote." The jury then came into court, and from questions by the court it learned that at least some of the jurors had not a clear idea of the distinction between an assault with intent to murder and an assault with intent to commit manslaughter, and the court, with considerable particularity, orally explained to them the difference, at times pausing to ask if all understood it, and, upon questions or suggestions by jurors, the court would explain further. The instructions, as orally given to the jury, were taken in shorthand by the reporter, and at the conclusion of the instructions (orally) the court said to the jury: "I will have this extended so that you may have the benefit of it." It then appears from the record that the jury was directed to retire for deliberation, and at once agreed upon a verdict (the one returned), and instructed the bailiff in charge to inform the court. The court, through the bailiff, directed the jury to wait for the written instructions. That, about an hour after the verdict was agreed upon and signed, the written instructions were received, read, and, by a vote, the verdict previously found was adhered to. Complaint is made of this action by the court.

Code, section 4420, fixes the order of trial in criminal cases, and, after argument by counsel to the jury, it provides: "*Seventh.* The court shall then charge the jury in writing, without oral explanation or qualification." Code, section 4440, is as follows: "The court shall, on motion of either party, instruct the jury on the law applicable to the case, which must always be in writing, signed by the judge, and filed with the clerk, and so marked by him, and it is to be deemed a part of the record of the cause, and no oral qualifications thereof shall be permitted." Section 4441 provides for the asking, in writing, of instructions to be given by the court, and that it may qualify such instructions "in writing, * * * but not orally." It seems to us that the legislature has attempted, with much particularity of expression, to prevent the giving of oral instructions in criminal cases. In fact, it is not contended in the case but that written instructions are what the law contemplates, but it is urged that subsequently reducing the instructions to writing, and furnishing them to the jury, obviates any objection because of the manner of first stating them; that, after they were written, and given to the jury, they became a part of the original instructions given by the court. But the suggestion leaves out of view what, to us, is a very significant fact in the case, and that is, that the jurors, being in such a situation as to their views of the case, that they could not agree, sought instructions from the court, which were given orally, and in explanation of other instructions, and, with deliberation under such oral instructions, found their verdict. Whether or not instructions orally stated, and afterwards furnished to the jury, in writing, before deliberation, would be a substantial compliance with the law, under the facts of this case, it is not important to decide. But that the law contemplates that the deliberations of the jury, under instructions of the court as to the law that is to guide it to a conclusion, shall be in writing, there is no reasonable ground to doubt.

It is true that, before the verdict was returned into court, the written instructions were handed to the jury, and it read them, and again agreed to the verdict it had prepared, but that would not cure the defect. It had before reached the conclusion, without the written instructions, and it then agreed not to change it. In *State v. McCombs*, 13 Iowa, 426, and *State v. Stanley*, 48 Iowa, 221, this court held that the law requiring the judge to sign the instructions was directory, and refused to reverse for a failure to do so, because it was without prejudice. It is urged that the same rule should apply to the departure from the requirements of the law in this case. But how different the requirements as pertaining to the jury. The signature is only to authenticate the instructions, and is of value only when they are afterwards made a part of the record. See *State v. McCombs*, *supra*. The instructions, apart from the signature, are for the consideration and guidance of the jury, and we must believe that the design of the law was that written instructions would furnish an added certainty of their being understood and followed. In a civil action it is error to orally explain or modify an instruction asked by either party, and equally so for the court, on its own motion, to charge the jury verbally. *Head v. Langworthy*, 15 Iowa, 235. In Kansas, under a statute of like effect in civil cases, where the court instructed orally, and the shorthand reporter's notes were extended and delivered to the jury after retiring, the action of the court was held to be reversible error. *Rich v. Lappin*, 23 Pac. Rep. 1038. The difference in the statutes of the two states, so far as material, is that the law of Kansas required the court to instruct in writing, "if requested by either party," and in this state the law makes the requirement. It does not appear in that case that the jury had deliberated before receiving the extension of the reporter's notes. If we are to say in this case that the departure is without prejudice, where shall the line between written and oral instructions be drawn? With such a holding, could

we say, in a case where the entire body of the instructions were oral, but furnished to the jury after agreement, and read, and the verdict as found adhered to, that the departure was prejudicial? With what better practical effect could we say there was prejudice, if no written instructions were furnished? The manifest purpose of the law is so plain as to forbid that we should open the door for such queries in future adjudications. We should probably say that there is reason to believe that the district court did not intend that the jury should proceed with its deliberations before receiving the written instructions. Its judgment must, however, be REVERSED.

THE STATE OF IOWA, Appellee, v. W. F. S. MURDY, Appellant.

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1. **Murder**: CONTINUANCE: COUNTER-AFFIDAVITS. Where a motion for a continuance is filed by the defendant in a criminal cause, the state may file counter-affidavits controverting the facts on which defendant's motion is based other than the averments as to what absent witnesses would testify to, if present.

2. ———: ———: ———. The defendant was indicted for the crime of murder on November 27, 1889, and on the same day was arraigned, and pleaded not guilty. January 28, 1890, that being the second day of the January term, he filed a motion for a continuance upon the ground of the absence of witnesses and the sickness of his attorneys. The state showed by counter-affidavits that all of the witnesses were able to attend court, and that one of defendant's attorneys was able to attend court, and that the other had only recently been employed. The court overruled defendant's motion, but authorized him to make a showing as to the condition of his attorneys and witnesses, February 4. No sufficient showing was made, however, and upon the trial one of the attorneys, alleged to be sick, with the assistance of another attorney, appeared and conducted the case, and all of the witnesses appeared and testified except two, one of whom had removed from the state, but no diligence to obtain his testimony was shown. *Held*, that the motion for a continuance was properly overruled.

3. ———: EVIDENCE: VERDICT. The evidence in this case reviewed, and *held* to support a verdict of murder in the second degree.

4. ———: EVIDENCE: ANTE-MORTEM STATEMENT. The victim of defendant's assault was wounded in the bowels, causing his death two days thereafter. Some time after the shooting, but on the same day, the county attorney waited upon the wounded man, and, after talking with him, requested that he make a statement for use in court. Such statement was thereupon made, presenting a brief narrative of the material facts connected with the shooting, and reciting that affiant made it freely, that he was in his right mind, and that same was made in the belief that he could not get well of the wound he had received. *Held*, that the statement was competent as a dying declaration.

5. ———: ———: ———: PRACTICE. The fact that evidence as to the competency of an *ante-mortem* statement, in such a case, is for the court, is no reason why it should not be received in the presence of the jury.

6. ———: INSTRUCTIONS. One paragraph of the court's charge instructed the jury that, if they failed to find that the defendant fired the shot in question "wilfully, deliberately and premeditatedly," they should find him "guilty only of murder in the second degree." This paragraph was preceded by an instruction as to the facts necessary to constitute the crime of murder in the first degree, and was immediately followed by instruction that, if they failed to find the defendant guilty of murder in either the first or second degree, they should then determine whether he was guilty of manslaughter, and proceeded to define that crime. *Held*, that considering the whole charge together the paragraph complained of could not have resulted in prejudice to the defendant.

7. ———: ———: SELF-DEFENSE. The use of the expressions "enormous injury." "enormous bodily injury" and "dreadful injury" in the court's charge in relation to the danger which defendant must reasonably have apprehended before he was justified in taking the life of his assailant, *held* not erroneous.

8. ———: ———: ———. An instruction that if defendant went to the shop of deceased with a view to provoking a quarrel he could not avail himself of the plea of self-defense, if he killed deceased in the difficulty thus sought by him, "though such killing may have become necessary to preserve defendant's life, or his person, from an imminent and enormous injury," but that he would be guilty of either murder or manslaughter; *held*, in view of the evidence, not improper.

Appeal from Appanoose District Court.—HON. C. D. LEGGETT, Judge.

THURSDAY, JANUARY 22, 1891.

THE defendant was accused of, and tried for, the crime of murder in the first degree, and convicted of murder in the second degree. He was adjudged to be imprisoned in the penitentiary at Fort Madison, at hard labor, for the term of ten years, and from that judgment he appeals.

G. D. Porter and *T. M. Fee*, for appellant.

John Y. Stone, Attorney General, *C. F. Howell* and *Thomas A. Cheshire*, for the State.

ROBINSON, J.—On the eighth day of October, 1889, Silas Tipton was shot with a pistol in the hands of defendant, and died from the effects of the wound received on the tenth day of that month.

I. The indictment was presented by the grand jury on the twenty-seventh day of November, 1889, and, on the same day, the defendant was arraigned, and pleaded not guilty. On the twenty-eighth day of January, 1890, that being the second day of the January term of court, the defendant filed an application for a continuance. The application was based on the alleged sickness of attorneys, and the absence of witnesses, and was supported by affidavits. Objections and counter-affidavits were filed on the part of the state, and the application was denied, but with leave to defendant to amend it. Additional affidavits were filed by defendant, and objections and counter-affidavits were again filed by the state. The application was sustained as to the witness, Ida Blanchard, unless the state would admit that she would testify to the facts stated in the affidavit for a continuance, if present. The state then admitted that she would so testify, and the cause was continued until the afternoon of the fifth day of February, and a continuance for the term was refused. At the same time the parties were ordered to make a showing on the fourth day of February, as to the condition of defendant's counsel, and as to any witness

1. MURDER: continuance: counter-affidavits.

who should be unable to testify at that time. No showing was made by defendant on the fourth, but on the next day he filed a showing with regard to the witness Ledbetter. To that showing the state filed objections and counter-affidavits, and the application was overruled.

The appellant complains of several rulings on the application. He insists that it was improper to permit the filing of counter-affidavits. Those filed tended to show that the alleged sickness of the attorneys for defendant did not exist; that one of them was not in fact employed until about the time the cause should have been ready for trial, if then, and that the witnesses, who, it was claimed, were sick and unable to attend court, were in fact in good health, or in such condition of health that they could readily attend court without danger of injury. None of the counter-affidavits sought to contradict the averments of the affidavits as to what the testimony of the witnesses would be. It was held in *State v. Rainsbarger*, 74 Iowa, 199, that other allegations of fact might be contradicted by counter-affidavits. See, also, *State v. Wells*, 61 Iowa, 630. The counter-affidavits filed in this case were proper under the rule adopted in those cases.

2. THE same.

II. It is said that the application for a continuance should have been allowed notwithstanding the counter-affidavits. It appears that defendant was notified before January that the state would demand a trial at the January term. The showing on the part of the state to the effect that one of the attorneys for the defendant was able to appear in court and discharge his duties as an attorney; that the other was only recently employed; and that all the witnesses who were alleged to be sick were in fact able to attend court and to testify, was so strong that we think the ruling of the court was fully sustained as to those persons. Moreover, it appears that all the witnesses who were alleged to be sick, excepting two, appeared and testified in the case. The court authorized defendant to make a showing on the fourth day of February as to the condition of his attorneys and witnesses. No showing was made on

that day, but, on the next, there was a showing made in regard to one witness, and that was insufficient of itself, and was contradicted by counter-affidavits. A. P. Cloud was alleged to be a material witness, who had moved from the state, but no diligence to obtain his testimony was shown. One of the attorneys, alleged to be too unwell to conduct the case for defendant, appeared and acted for him. He was assisted by another who was called into the case but a short time before the trial was commenced. The defense seems to have been conducted with intelligence and ability. If there was reason for a continuance on the fourth of February, defendant failed to show it. After a careful examination of the record, we conclude that the application for a continuance was properly overruled.

III. The appellant contends that the verdict is not supported by the evidence. While there is much conflict in the evidence, we think the jury might have found the material facts of the case to be substantially as follows: At the time of the shooting, defendant was a practicing physician of Moulton, and Tipton was conducting a meat market in that place. There was bad feeling between the men, defendant having accused Tipton of interfering with his business to his prejudice, and each had threatened injury to the other. On the eighth day of October, 1889, defendant left home with his medicine case. His wife called him back telling him he had forgotten his revolver. He had been threatened by a man named Thorp, and, it is claimed, carried a revolver on that account. After he left home with the revolver, his wife sent a servant named Williams for some meat. Tipton kept the only meat market in the place, and Williams went to him to obtain the meat, but was refused. Tipton stated as a reason for his refusal that defendant had owed him for more than two years. Williams procured the meat by paying for it with his own money, and took it home. After a time, Mrs. Murdy sent him to defendant to procure some apples. He went up into the town, and waited on a corner until

8. ——: evidence: verdict.

he saw defendant approaching. When defendant came up, Williams told him what Tipton had said. Defendant gave his medicine case to Williams and went to Tipton's place of business. That was in a building which stood on the west side of a street which extends from north to south, and fronted east. In the east front of the room occupied by Tipton was one door, and a window on each side of it. There was also a door at the west end of the room. In the southeast corner was a safe containing account-books, and on the safe was a desk. A meat counter extended from the south wall northward to a point about opposite the front door, and eight or ten feet from it. Northwest of the counter were two chopping blocks, on which were cleavers and knives. In the southwest corner of the room was an ice-box. When defendant approached from the south, Tipton was sitting on a box outside, and at the southeast corner of his building. Defendant stepped in front of Tipton, and asked him if he had purchased anything of him during the last year which was not paid for. Tipton said, "Yes." Defendant replied: "You are a damned liar." Tipton then rose from the box, and advanced towards defendant. The latter at once pointed a revolver at Tipton, saying, "Don't do that, or you are a dead man," adding an opprobrious epithet. Where the defendant had kept the revolver, until the moment of presenting, it does not clearly appear, but it is shown that, as he approached Tipton, he carried his hands and arms in a peculiar manner, as though he were concealing the revolver in his sleeve. Tipton stopped when the revolver was presented, and the men indulged in considerable abusive and profane language towards each other. Tipton finally said his books showed the account, and started into his shop, as though to show them, Murdy following, with his pistol in his hand. Tipton turned southward towards the books, but, instead of opening the safe for them, raised the lid of the desk, and took therefrom a heavy stock whip. Seizing it near the small end of the short handle, with which it was provided, he turned towards defendant, raising the handle as

though about to strike. Defendant raised the revolver, pointing it towards Tipton, and the two men approached each other. Tipton caught an arm of defendant, dropped the whip and attempted to prevent the discharge of the revolver. He did not strike, nor attempt to strike, the defendant. About the time he dropped the whip the revolver was discharged, and he received a wound in the abdomen, from the effects of which he died. After the shot was fired, there was some scuffling, the defendant trying to shoot again, and Tipton holding him down, and trying to prevent him. Other persons interfered, and the men were separated.

It is claimed on the part of defendant that, when he approached Tipton as he sat on the box, he did so for the purpose of having an amicable settlement, without any intent to cause trouble; that he did not have his revolver in his sleeve, nor in his hand, until after Tipton rose from the box; that, when he rose, he presented a dangerous knife, with which he had been whittling, and threatened defendant with it, and that defendant then drew his pistol in self-defense; that, when Tipton said the books showed the account, and went into the shop, apparently to produce the books, defendant followed him with the revolver in his pocket, and without any thought of further trouble; that, without provocation, Tipton attacked him with the whip, striking him with it on the head and arms, and that the pistol was discharged in the struggle which followed, without volition on his part; and that what he did was justifiable in self-defense. We think the jury may well have found that these claims were not well founded. Defendant spoke of the affair soon after it occurred to several persons without claiming that Tipton struck him. He gave as a reason for shooting that Tipton drew the whip on him; and also stated that he thought he shot him lower down than he did. The remarks, so made, tend to show that the shooting was intentional. There is sufficient evidence to justify the conclusion that defendant went to Tipton's shop in an angry mood, armed with a deadly weapon, so carried as

to be available for instant use, for the purpose of getting satisfaction for a supposed insult; that he was the aggressor in the beginning; that he used language which was calculated to provoke an assault by Tipton when he first met him, when Tipton went into the shop, and until the assault was made; that he took no means of avoiding the collision which his conduct invited, but rather sought it; that he did not retreat, as he might have done, when Tipton approached, but, on the contrary, advanced to meet him; that he did not fire the shot until after Tipton had thrown down the whip, and when he had no reason to apprehend any great personal injury. It is true, that, shortly after the affray, defendant exhibited bruises on the arm and head, and a slight injury to the nose, but they might have been received, during the scuffle, from the counter, ice-box or meat blocks, or may even have been self-inflicted. In our opinion, the evidence is sufficient to sustain the verdict.

IV. The state introduced in evidence a statement made and signed by Tipton a few hours after he was shot. It is as follows: "Dr. W. S. F. Murdy sent his hired man to my place for meat this morning, October 8, 1889. I refused to give him meat because I already had an account against Murdy of two years' standing. About ten minutes after hired man left, Murdy came to my shop. He said: 'Why in hell did not you let that nigger of mine have that meat?' I told him I had let him have too much already. He said: 'You damn son of a bitch, I will blow your brains out.' Pulled a revolver in my face, in the presence of M. Hartman and Ralph Davis. I put him off. I went in the shop. He followed. Showed him the account, he cursing all the time. Did not look at the account. Had the revolver out all the time. Pulled the revolver in my face. I pushed it down as far as I could. It went off and shot me in the bowels. Just before he shot, I had a stock whip. I saw he was going to shoot, and dropped the stock whip

4. ——: evidence: ante-mortem statement.

and grabbed his arm, and the revolver went off and shot me. I did not try to hit him at any time, nor had no intention of hitting him. Did not want any trouble with him. All this occurred in Moulton, Iowa, on October 8, 1889. I make this statement in my right mind, freely, calling God to be my witness of its truthfulness, for I fully believe that I am mortally wounded, and cannot get well of the wound I received this morning, and, expecting soon to be in the presence of my God, I make this statement.

"[Signed] S. TIPTON."

The appellant insists that it should not have been admitted in evidence, for the following reasons: "*First.* That it was not made in expectation of immediate dissolution, and no proper foundation was laid for its introduction; *second*, that it was only a partial statement; *third*, that no opportunity was given the defendant to introduce evidence affecting its competency." The evidence shows that Tipton was convinced from the first that the wound was mortal. He was told by a physician that he could not recover. He was suffering great pain, and expected to die soon. Under these circumstances we think the statement was competent as a dying declaration. *State v. Leeper*, 70 Iowa, 751; *State v. O'Brien*, *ante*, p. 88. Tipton had taken opiates, at the time of making the statement, to deaden the pain he was suffering; but it is shown that his mind was vigorous and clear, and that he was fully conscious of what he was saying. He had not sent for anyone to receive the statement, and had not suggested a desire to make it. Mr. Howell visited him and stated that he desired him to make a statement for use in court as evidence. Mr. Howell appears to have been the county attorney, and, no doubt, wished to procure the declaration or statement for use in prosecuting defendant. There was some talk between him and Tipton before the writing was commenced, but it appears that the language of the statement was dictated by Tipton, and that the instrument was drawn as he

wished it to be. It contains a brief narrative of the most material facts connected with the shooting. The fact that Tipton may have said some things before the writing was commenced, which it does not contain, is not an objection to its use as evidence. It was drawn with deliberation, and, no doubt, it contains what he regarded as a fair and truthful narration of the unfortunate occurrence. We think that is sufficient. In regard to the claim that defendant was given no opportunity to introduce evidence affecting its competency, we would say that he does not appear to have desired such an opportunity. His attorneys cross-examined the witnesses for the state, who testified respecting it, at length, and, so far as we are advised, offered nothing in rebuttal. The only objection offered to the admission of the instrument was that the proper foundation for its introduction had not been laid. We think the objections were not well grounded.

V. It is claimed that evidence as to the competency of the statement should have been received in the absence of the jury, for the reason that its admissibility was a question for the court alone to determine. We know of no rule requiring practice of that kind. Questions in regard to the admissibility of evidence are constantly arising in the trial of causes, and it rarely happens that they may not be heard and determined in the presence of the jury. To require the jury to retire would in most cases involve an unnecessary loss of time, and retard the business of the court. In some cases, doubtless, questions arise which should be tried and determined in the absence of the jury; but we do not think this was a case of that kind.

5. —: —: —: practice.

VI. The eighth paragraph of the charge to the jury is as follows: "8. But, if you fail to find that the shot was fired by the defendant wilfully, deliberately and premeditatedly, as these terms have already been explained, you should find him guilty only of murder in the second degree,

6. —: instructions.

and return a verdict accordingly." Appellant complains of this as ignoring the fact that he may have been guilty of manslaughter only. Standing alone, it seems to be vulnerable to that objection, but, when considered in connection with the instructions immediately preceding and following it, the fact appears that it could not have been understood by the jury to have the effect claimed. It follows an instruction in which the facts necessary to constitute the crime of murder in the first degree are specified, and was apparently designed to instruct the jury that, if the facts specified were wanting, the offense would only be that of murder in the second degree. It is immediately followed by an instruction which directs the jury that, in case they fail to find the defendant guilty of murder in either the first or second degree, they will then determine whether he is guilty of manslaughter. The court then proceeded to define that crime. We conclude that prejudice could not have resulted from the eighth instruction.

VII. In several instances, the court, in its charge to the jury, used the expressions "enormous injury," "enormous bodily injury" and "dreadful injury," in connection with the danger which defendant must reasonably have apprehended before he was justified in taking the life of Tipton. Appellant objects to the expressions, on the ground that he would have been justified in taking the life of Tipton under the circumstances, as he claimed them to exist, if he had reasonable ground to apprehend great bodily injury to himself, and that the expressions used by the court were calculated to lead the jury to believe that the danger to be feared must be more serious than that of great bodily injury. There is authority for the use of the expressions in question. *State v. Keasling*, 74 Iowa, 532; *State v. Perigo*, 70 Iowa, 663; *State v. Benham*, 23 Iowa, 161. In this case, they were used as the equivalent of "great bodily harm," and, as so used, we think they were not erroneous.

7. —: —: self-defense.

VIII. The seventeenth instruction is as follows: "17. If Silas Tipton said to defendant's hired man that defendant was indebted to him, or that he would not sell to defendant, on credit, until such debt was paid, it was proper and lawful for the defendant, when informed of such claims, to go to Tipton's shop, for the purpose of learning what amount, if any, was owing by him to Tipton, or to pay it; and, if defendant went to Tipton's shop for such purpose or purposes, and not to provoke a difficulty or quarrel with Tipton, he was in the proper exercise of his lawful rights. But, if you find from the evidence that the defendant went to Silas Tipton's shop with a view to provoke a quarrel or bring on a difficulty with Tipton, he was not acting lawfully in doing so, and, in that case, he cannot avail himself of the plea of self-defense in killing Tipton, if he killed him in the difficulty so sought by defendant, though such killing may have become necessary to preserve the defendant's life, or his person, from an imminent and enormous injury; but he would be guilty of murder or manslaughter, as you find the facts to be, under the rules given you elsewhere in these instructions." There was evidence on which to base the instruction, and it expresses the law as announced in *State v. Neeley*, 20 Iowa, 115.

8. THE same.

IX. Counsel for appellant discuss many other questions involving the correctness of rulings on the admission of evidence, the giving of instructions, and refusing to give instructions, asked by defendant. Some of them are interesting, but we do not think they are sufficiently important to justify us in referring to them separately and at length. Of the forty-nine instructions given, it is argued that more than half are erroneous. It is said that the question of reasonable doubt should have been embraced in each of twenty-one separate instructions specified, although it was referred to, and fully defined in four others. It is not practicable to incorporate in each instruction the exceptions to and modifications of the general rule therein given. To

attempt to do so would lead to prolixity, and tend to confuse rather than to enlighten the jury. Many of the objections made would be well founded, if applied only to parts of the charge taken separately, but are in fact groundless when considered in connection with the charge as a whole. Appellant complains of the refusal of the court to give nine instructions asked by him. So far as they were important and correct, they were incorporated in the charge given. An examination of the entire record satisfies us that the case was carefully tried, and that there is nothing of which appellant can justly complain. It is true the jury might have reached a different conclusion from the evidence submitted, but it was their duty to weigh the evidence, and decide according to it and the charge of the court. We think that the charge of the court was fair to the defendant, and that the record sustains the verdict. AFFIRMED.

THE STATE OF IOWA, Appellee, v. CHARLES K. SHREVES, Appellant.

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1. **Manslaughter**: SELF-DEFENSE: EVIDENCE. The defendant was indicted for the crime of murder in the second degree. He admitted having inflicted the wounds resulting in the death of the deceased, but insisted that he acted in self-defense. The evidence showed that, on the evening when the act was committed, the deceased was under the influence of liquor, and unable to walk steadily, and that when in such condition he was quarrelsome, garrulous and insulting; that he had previously taken offense at defendant because of a report that he had insulted his sister, and had stated to others that he intended to whip him the first time he saw him; that, meeting defendant on the street, he told him he wanted to speak to him, and the two walked off together; that so far as their conversation was overheard by others it indicated that the deceased was charging defendant with some reprehensible conduct, and that defendant was denying it; that finally the deceased addressed defendant, saying, "I will whip you," and

"you have got to fight;" that soon afterwards the deceased was seen on the ground, with defendant leaning over him; that when the deceased was found just after the encounter he was unable to speak and was in a dying condition, and had six wounds upon his person, one in the back, another on the shoulder blade, another on the right arm, another just above the left eye-brow, another on the nose, and another on the left of the breast-bone, all of which, except those on the nose and eye-brow, were severe cuts, and were made by defendant with his knife; that before the fight deceased had removed his coat and vest, but when found he had no weapon on his person, and none was found at the place of conflict; that defendant's clothing after the encounter was neither soiled, torn nor disarranged, and there was no evidence that he received any injury. *Held*, that the evidence warranted the jury in finding the defendant guilty of manslaughter.

2. **Acts of General Assembly**: TITLE: VALIDITY. The omission from an act of the general assembly of any reference to the number and name of a chapter of the Code amended thereby, as provided by Code, section 38, will not invalidate such act, even though the secretary of state fail to supply such omission as required by the same section.

3. **Peremptory Challenges**: EX POST FACTO LAWS: ACTS PERTAINING TO REMEDY: VALIDITY. At the time defendant's crime was committed the law in force entitled defendants in such cases to twenty peremptory challenges to the jury, and the state to but ten. Subsequently, the law was amended by the legislature so as to give the defendant but ten such challenges, the same as given to the state; which law did not go into effect until after the commencement of the prosecution herein. *Held*, that the amendment affected no vested right of the defendant, but pertained merely to the remedy, and was valid.

4. **Criminal Prosecutions**: COUNTY ATTORNEY: ASSISTANT COUNSEL. The employment of counsel by a prosecuting witness or party complaining, with the approval of the court and county attorney, to assist in the prosecution of a criminal case, is not prohibited by Acts of the Twenty-first General Assembly, chapter 73, section 4.

5. ———: ARGUMENT TO JURY: IMPPOPER REMARKS BY COUNSEL FOR STATE. A judgment in such a proceeding will not be reversed on account of improper remarks alleged to have been made by counsel for the state in the closing argument to the jury, when there is a marked conflict in the record upon the question whether such remarks were made, and it does not appear that any objection was made thereto until after the verdict was rendered.

6. **Murder**: SELF-DEFENSE: INSTRUCTIONS: USE OF WORD COURAGEOUS. An instruction to a jury upon the issue of self-defense in a prosecution for murder, that in determining whether the defendant was justified in using a dangerous weapon in self-defense, the

inquiry is "whether, from all the attendant and surrounding circumstances at the time of the conflict, it reasonably appeared to defendant, as a reasonable, prudent, courageous and cautious man, that he was about to suffer death or great bodily harm" at the hands of the deceased, while not accurate according to a strict construction of the language used, yet it will not be deemed a reversible error when the rule applicable to self-defense is correctly stated in several other paragraphs of the court's charge, and it is apparent that the court intended to qualify the word "courageous" by the word "reasonably."

Appeal from Adair District Court.—HON. A. W. WILKINSON, Judge.

THURSDAY, JANUARY 22, 1891.

THE defendant was indicted for the crime of murder in the second degree. He was tried and convicted of manslaughter, and sentenced to imprisonment in the penitentiary for the term of three years, and he appeals.

Grass & Storey and *Gow & Hager*, for appellant.

John Y. Stone, Attorney General, *C. W. Neal*, County Attorney, and *Chas. S. Fogg*, for the State.

ROTHROCK, J.—The indictment charges that the defendant killed one Louis Miars, and that the act was done under such circumstances as to constitute the crime of murder in the second degree. The defendant pleaded not guilty. The evidence shows without dispute that Miars came to his death by reason of wounds inflicted upon his person by the defendant, with a knife. The defendant was a witness in his own behalf, and he testified that he inflicted the wounds which caused the death of Miars. But it was strenuously contended all through the trial, and counsel for defendant earnestly contend in their argument in this court, that the killing was excusable on the ground of self-defense. And it is insisted that, under all the evidence in the case, the jury should have found the defendant not guilty. In other words, it is claimed that the verdict is not supported by

the evidence. When the state had completed the introduction of the evidence in behalf of the prosecution, a motion was made to dismiss the case, on the ground that there was no evidence authorizing a conviction. The same ground was embodied in the motion for a new trial.

I. We are required, first, to determine whether the court erred in overruling these motions on the grounds stated, and, as they present in effect the same questions, we will consider them together. It appears from the record that the tragedy occurred at the village of Orient, in Adair county, at about eight o'clock P. M. on the second day of June, 1888. Orient is a place of about one hundred and fifty or two hundred inhabitants. Miars was a married man, and resided about a mile and a half from the village. But he had been for some time in business in the village. At one time he kept a meat market, and at the time of the homicide he was engaged in selling fresh fish. Shreves had been engaged in assisting his brother in a hardware store in the village. He quit his employment some time before the year 1888, and went elsewhere. He returned to the village but a few hours before he killed Miars. He arrived there on a train on his way to the home of his father, who resides at Greenfield, and was induced by his brother to stop off and remain until the next day. It appears that both Miars and Shreves were well known to the people of the village and the surrounding neighborhood. A large number of witnesses testified to the character and reputation of Miars. He was addicted to the excessive use of intoxicating liquor, and was frequently very much intoxicated. When sober, he was of a peaceable and orderly disposition; when drunk, he was quarrelsome, garrulous and insulting. This trait of his character seems to have been confined to mere quarreling. It does not appear that he had the reputation of being a dangerous man. No witness testified that he was a dangerous character. It is true that it was shown in evidence that at times he carried a revolver and a knife,

1. MANSLAUGHTER: self-defense: evidence.

and that he frequently carried in his pockets metallic knuckles. He had a young, unmarried sister, who resided with her father in or near the village, and it appears that he had taken offense at Shreves, because of some report that came to him that Shreves had insulted his sister. He stated to others that he intended to whip Shreves the first time he met him, because Shreves wanted his sister to meet him at a hotel in St. Louis or Kansas City, and register as Mrs. Shreves. Shortly after Shreves arrived in Orient, he called on the young woman and remained a short time, and then went to his brother's store with a brother of Miars. Louis Miars was very much intoxicated on that day and evening; so much so that it was plainly noticeable. All the witnesses concur in this. He was able to walk, but it was in a staggering way. He was in this condition when he approached Shreves on the street, and said he wanted to speak to him. Shreves answered, "Very well," or words to that effect, and stepped aside to hear what he had to say. The two men walked off together. Only part of their conversation was heard by others. The import of it was that Miars was charging Shreves with having been guilty of some reprehensible conduct, and Shreves was denying it. They continued their walk in the direction of the home of Miars' father, and some of their conversation appeared to convey the idea that they were going there to settle the matter of which Miars was complaining. Miars was insisting on a fight, and Shreves was refusing to fight. After going some distance, they could not be seen distinctly, and only occasional expressions could be heard from them. As one witness expressed it: "Miars seemed to be charging him with something, and he was denying it." The same witness heard Miars say: "I will whip you [with an oath], or, God damn you, you have got to fight." The next that was heard Miars said: "I will take it back, I will take it back." Miars was then on the ground, and Shreves was leaning over him. Shreves said to Miars: "What can I do for you? I will do anything in the world for you. I will go up town and

see and get some one to help you." He started for town and met Dr. Monette, who had heard the conversation above set out, who asked him: "What are you doing down there?" Shreves replied: "That man jumped onto me, and I am afraid I have hurt him. I wish you would go down and see him. I will go up town and get some one, too, or send some one back." Dr. Monette went down to where Miars was lying, and found him unable to speak, and in a dying condition. He was carried to his father's home, and expired in a very short time. When Miars was found, he had no weapon on his person, and none was found at the place of conflict. He had removed his coat and vest before the fight. These garments and a pint bottle of whiskey, nearly full, were found on the ground near where the fight took place. There is no evidence that the defendant received any injury whatever in the fight. His clothing was neither soiled, torn nor disarranged. Six wounds were found upon the person of Miars. The evidence shows that they were made by the defendant with his knife. One wound was in the back, another on the shoulder-blade, another on the right arm, another just above the left eyebrow, another on the nose, and another on the left side of the breast-bone. All of these wounds, except those on the nose and eyebrow, were severe cuts. That on the back was five inches long, and from one to one and one-half inches deep. The one on the shoulder-blade was two inches deep, and two inches long. The wound on the arm was a stab not over three-quarters of an inch wide, and something less than an inch deep. The wound near the breast-bone was about two inches deep, and was necessarily fatal. It is impracticable to set out in detail all of the minute facts in a case like this in an opinion. The jury were fully warranted in finding the leading facts to be as we have stated them above. In view of the drunken, staggering condition of the deceased, the removal of his coat and vest for a fist-fight, and the six gaping wounds inflicted upon him by the defendant, and taking into account the further fact that the clothing of the defendant was

not disarranged, and that he received no injury in the conflict, it would be an amazing departure from all judicial precedent for this court to determine that the jury were not warranted in finding the defendant guilty of manslaughter. The rulings of the court in this respect were correct.

II. Upon the impaneling of the jury to try the case, the defendant demanded the right to twenty peremptory challenges. The claim was denied, to which ruling the defendant excepted, and it is urged that this ruling was erroneous. Sections 4413 and 4414 of the Code provide that, if the offense charged in the indictment is or may be punished by imprisonment in the penitentiary for life, the state is entitled to ten peremptory challenges, and the defendant twenty, and that the state shall be entitled to the first challenge, and shall challenge one juror, and the defendant shall be entitled to the second challenge, and shall challenge two jurors, and so on alternately until all the challenges are exhausted. These sections of the law were amended by chapter thirty-nine of the Acts of the Twenty-second General Assembly, which took effect on the fourth day of July, 1888. The amendatory act, with its title, is as follows: "*Peremptory Challenges of Jurors.* An act to amend sections 4413 and 4414 of the Code of Iowa, relating to peremptory challenges of jurors in criminal cases. Be it enacted by the general assembly of the state of Iowa: Section 1. That sections 4413 and 4414, of the Code of Iowa, be, and the same are hereby, amended to read as follows: 'Sec. 4413. If the offense charged in the indictment is or may be punishable with death or imprisonment for life, the state and defendant are each entitled to ten peremptory challenges; if any other felony, to six each, and, if a misdemeanor, to three each. Sec. 4414. The state shall be entitled to the first challenge, and shall challenge one juror; the defendant shall be entitled to the second challenge, and shall challenge one juror; the state shall

2. Acts of general assembly: title: validity.

be entitled to the third challenge, and shall challenge one juror; the defendant shall be entitled to the fourth challenge, and shall challenge one juror; and so on alternately until all the challenges are exhausted.' Approved April 12, 1888." It is claimed that this amendatory act is unconstitutional, because it is defective in its title, in not stating the subject of the legislation as required by section 29, article 3, of the constitution. The argument of counsel is not really a contention that the subject is not expressed in the title, but that it fails to comply with another section of the Code, which is as follows: "Sec. 38. Every act passed in amendment of, or in addition to, any chapter or section of this Code, or in addition to any previous act of the same kind, shall contain in the title thereof a reference to the number and name of the chapter so amended or added to, and, if such reference be omitted, the secretary of state shall, in preparing such act for publication, supply the omission." It is claimed that the amendatory act was not legally enacted, because there is no reference in the title to the number and name of the chapter of the Code which was amended. The answer to this claim is plain. By the very terms of the section requiring the number and name of the chapter to be referred to, it is provided that, if such reference be omitted, the secretary of state shall supply the omission. But it is claimed that the omission was not supplied. This may be true, and yet the act is not for that reason to be held invalid. It is a provision merely in aid of ready reference, and the validity of the law cannot be affected by the omission of the secretary of state to perform a mere clerical act. The title of the amendatory act fills all of the requirements of the constitution.

III. It is further claimed that the defendant had the right to twenty peremptory challenges, because the alleged crime was committed and the prosecution commenced before the amendatory act took effect. It is insisted that the repeal of the former statute could not

3. PEREMPTORY challenges: ex-post-facto laws: acts pertaining to remedy: validity.

affect the defendant's right to twenty peremptory challenges. The statute upon which the claim is made is section 45 of the Code, which provides, among other things, that "the repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed." The amendment of the original section of the Code was not a repeal. It affected no vested right (it pertained merely to the remedy); no right such as trial by jury, the statute of limitations, or appraisement or exemption laws. It is a mere amendment as to the manner of making up a jury for the trial of a cause, and is applicable to the organization of all juries after it took effect, no matter when the proceeding was commenced. *Eikenburg v. Edwards*, 71 Iowa, 82.

IV. It is claimed that the county attorney in making his opening statement to the jury was guilty of such misconduct as to require a reversal of the judgment. It is not necessary to set out all of the opening statement. It is claimed that it contained assertions as to what evidence would be introduced by the state, which were untrue; that no such evidence was offered; and that the unwarranted statements were very prejudicial to the defendant. An examination of the full address made on that occasion, in connection with the evidence in the case, satisfies us that there was no such a departure from proper methods as required the court below to set aside the verdict and grant a new trial.

4. CRIMINAL prosecutions: county attorney: assistant counsel.

V. It is further claimed that the court erred in permitting counsel other than the county attorney to appear and take part in the prosecution. It is not denied that, prior to 1886, it was within the discretion of the court and the district attorney to allow assistant counsel in the trial of a criminal cause. See *State v. Fitzgerald*, 49 Iowa, 261; *State v. Montgomery*, 65 Iowa, 483; *State v. Ormiston*, 66 Iowa,

THE SAME.

143. But it is claimed that by section 4 of chapter 73 of the Acts of the Twenty-first General Assembly no attorney is authorized to appear and assist in the trial of a cause at the instance of a private prosecutor. That section is as follows: "The county attorney may appoint deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties. With the approval of the district court, he may procure such assistance in the trial of a person charged with the crime of felony as he shall deem necessary, and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors. But nothing in this section shall be construed to prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested." This section contains no language prohibiting a prosecuting witness or party complaining from employing counsel, with the approval of the court and county attorney, to assist in the trial of a criminal case. In the absence of such a prohibition, the rule is not changed from that announced in the cases above cited.

VI. Complaint is made of certain language used by counsel representing the state in the closing argument to the jury. We must be allowed to dispose of this very briefly. It is not necessary to set out the alleged improper language. It is enough to say that there is a marked conflict in the record as to whether the alleged improper remarks were made. Moreover, no objection was made thereto until after verdict. Under such circumstances it is unnecessary that we should repeat the language, much less reverse the judgment on the determination of this issue, which appears to have been tried with about as much particularity as the trial of an ordinary action.

5. ——: argument to jury: improper remarks by counsel for state.

VII. Complaint is made of the refusal to give to the jury certain instructions requested by the defendant.

6. MURDER: self-defense: instructions: use of word courageous.

These instructions are either in substance embodied in the charge by the court, or they were not required to be given in any view of the case. It is urged that certain paragraphs of the instructions given by the court are erroneous. We have examined the charge throughout with care, and have to say that we think the objections thereto are not well taken. We desire to make special mention of but one objection. The twenty-second paragraph of the charge is as follows: "The killing of an assailant is justifiable on the grounds of self-defense only when it reasonably appears to be the only means of saving the life of the party assaulted, or preventing some great injury to his person. If it is apparent that the danger which seemed to threaten him can be avoided or prevented by any other means in his power, he is not justified in taking the life of his assailant. In determining whether the defendant in this case was justified in using a dangerous weapon in self-defense, the inquiry is not whether danger to him existed in fact, but whether, from all the attendant and surrounding circumstances at the time of the conflict, it reasonably appeared to the defendant, as a reasonable, *prudent, courageous* and *cautious man*, that he was about to suffer death or great bodily harm at the hands of the said Louis Miars, and if it so appeared to him, and if it further appeared to him to be the only means of saving his life, or preventing great bodily harm, he would be justified; otherwise, he would not be justified." The use of the word "courageous" is claimed to be erroneous. It is not to be denied that a strict construction of the language employed is inaccurate. If the court had used the word "reasonably" instead of "reasonable" in connection with the words "prudent, courageous and cautious," it would be within the rule of responsibility prescribed by this court in numerous decisions. In view of the fact that the rule applicable to self-defense is correctly and accurately stated in several other paragraphs of the charge, we think the

court surely intended to qualify the word "courageous" by the word "reasonably," and we think the failure to do so cannot be said to be erroneous. The instructions are not necessarily repugnant to each other. A careful examination of the whole record has led us to the conclusion that the judgment should be AFFIRMED.

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KEZIA PATTERSON, Appellee, v. HENRY S. PATTERSON, Appellant.

Deed: CARE AND MAINTENANCE AS CONSIDERATION: RESCISSION. The plaintiff, a woman of sixty-two years of age, and in infirm health, conveyed to defendant, her son, by quitclaim deed, eighty-five acres of land, valued at six thousand dollars, in consideration of "future maintenance and care." The defendant moved upon the land, and made certain improvements and repairs, which were largely paid for out of the proceeds of the farm. After four or five months the parties disagreed, and, upon plaintiff's direction and demand, the defendant removed from the premises. *Held*, that the contract was to be construed as binding the defendant to give to the plaintiff such care and attention as her age and infirmities demanded for her comfort, which included not only physical comforts, but gentleness, indulgence and friendly words of encouragement; and that defendant, having failed to care for the plaintiff in accord with this requirement, had violated his contract as expressed in said deed; and, by his withdrawal from the premises, having shown his determination to continue in its violation, a decree setting aside the conveyance was proper.

Appeal from Linn District Court.—HON. JAMES D. GRIFFIN, Judge.

FRIDAY, JANUARY 23, 1891.

ACTION in chancery to annul and set aside a deed for land made by plaintiff to defendant. There was a decree granting the relief prayed for by plaintiff. The defendant appeals.

Davis & Voris, for appellant.

Thompson & Lanning, for appellee.

BECK, C. J.—I. This is one of those often recurring cases in which aged and infirm parents, burdened with care of their farms, which, on account of their infirmities, they are incapable of managing, convey them to a son or daughter, or other relative, in consideration of care and support for the remainder of their days. This case, like all the great number that have reached this court, discloses discontent of the parent, and failure to perform his obligations on the part of grantee of plaintiff, resulting in unseemly litigation between mother and son. It would appear that frequency of litigation of this character would warn aged and infirm persons to retain the title and possession of their property, rather than convey it to children or kin to secure support. If contracts of this kind are necessary to secure support for the property-owners, in many cases they had better be made with strangers than with relatives.

II. The plaintiff was a woman sixty-two years of age, and in infirm health. She had lived apart from her husband fifteen years or more, being left in charge of a family of seven children, some of them of tender years. The defendant is one of those children, and at the time of the separation of his parents was about twelve years of age. The plaintiff owned eighty-five acres of land, of the value of about six thousand dollars, and some other property. She conveyed the land to defendant, by a deed in the following language:

"In consideration of future maintenance and care, I, Kezia Patterson (unmarried and single), of Linn county, state of Iowa, hereby sell and convey and forever quitclaim unto Henry S. Patterson, of the county of Linn, and state of Iowa, the following described premises, in the county of Linn, state of Iowa, to wit: The east half of the southeast quarter of section thirty-one (31), in township 84, north, of range 6, west of fifth principal meridian; also that certain part of the west half of the southwest quarter of section 32, in same township and range, lying west of the road running north and south through the same,—containing in all herein

conveyed eighty-five (85) acres, more or less. The said Kezia Patterson reserves to herself, and for her own use and benefit, during her lifetime only, the right to have, use and occupy all of said land herein conveyed, and all dwelling-houses, barns and stables on said land, and all the rents and profits of the same, to have and hold the said premises unto the said Henry S. Patterson, his heirs and assigns, forever, with all and singular the appurtenances thereunto belonging, with the reservations above set forth as a lien thereon.

"Signed this twentieth day of March, A. D. 1888.

"KEZIA PATTERSON."

The plaintiff testifies that she was urged by defendant to execute this deed. This defendant denies in his evidence, and testifies that plaintiff first proposed the conveyance made by her. It is not denied that defendant undertook, in consideration of the conveyance, to care for and maintain plaintiff. He moved upon the farm in controversy, and made certain improvements and repairs, which were largely paid for out of the proceeds of the farm. After four or five months, the parties disagreed, and, upon plaintiff's direction and demand, defendant removed from the premises. Under the contract between the parties, defendant was to care for and maintain plaintiff upon the farm.

III. We conclude from the evidence that defendant failed to give plaintiff the care demanded by her age and condition of health, which his contract required. The law will construe the contract to bind defendant to give such care and attention to plaintiff as her age and infirmities demanded for her comfort. She was advanced in age and in ill health. She required not only physical comforts, but gentleness, indulgence and friendly words of encouragement, which not only filial duties demand that a son should bestow upon a mother, but common humanity demands one human being shall extend to another afflicted as plaintiff was. The defendant, in failing to care for his mother in accord with this requirement of filial duty and of humanity, violated the contract, thus failing to render the very consideration

of the deed. His withdrawal from plaintiff's house, where he was under the contract, as admitted in his answer, to bestow care upon plaintiff, shows his determination to continue in its violation. This failure to perform the contract which is the consideration of the deed is a sufficient ground to support the decree of the district court setting it aside. Equity will not permit a party to enjoy the fruits of contract when he deliberately refuses to perform the obligations imposed upon him therein. Other points in the case presented by counsel need not be considered, as we think, on the ground we have stated, the decree of the district court ought to be AFFIRMED.

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HARLOW BAIRD, Appellant, v. E. S. ELLSWORTH, Appellee.

Tax Title: NOTICE: LACHES OF OWNER: ESTOPPEL. A tax deed issued upon insufficient notice will not be deemed invalid as against one claiming the property as owner, whose interest therein does not appear of record, and who for nearly twenty-eight years stood silently by and permitted others to pay the taxes thereon, and spend money and labor in acquiring title and improving the land.

Appeal from Sioux District Court.—HON. C. H. LEWIS, Judge.

FRIDAY, JANUARY 23, 1891.

THIS is an action in equity. The plaintiff claims to be the owner of the southwest quarter of the northeast quarter of section number 34, in township 95 north, of range 47 west, and asks to have set aside a tax deed therefor, and to be permitted to redeem from tax sale. The defendant also claims to be the owner of the land described, and asks that the title thereto be quieted in him. There was a trial on the merits, and a decree in favor of defendant. The plaintiff appeals.

Pitts & Kessey, for appellant.

W. S. Palmer, for appellee.

ROBINSON, J.—The land in controversy was conveyed to plaintiff by a patent from the general government, which was dated December 1, 1859. On the fifteenth day of that month plaintiff conveyed the land to Alfred M. Elam, to be held by him in trust for plaintiff. In the year 1866, or 1867, Elam reconveyed the land to plaintiff by a deed which was never recorded, and which is now lost. Neither plaintiff nor Elam paid any taxes on the land. On the fourteenth day of December, 1865, the treasurer of Sioux county issued to E. L. Stone a tax deed for the land, on account of an alleged sale thereof made on the fourteenth day of November, 1860, for delinquent taxes for the years 1858 and 1859. The deed so issued was recorded on the third day of January, 1866. On the fifteenth day of October, 1869, a second tax deed for this land, which recited that it was made in obedience to a writ of *mandamus* issued from the district court of Woodbury county "in place of and instead of" the deed first named, was executed. The second tax deed was recorded on the third day of December, 1869. On the twenty-fifth day of September, 1869, Stone conveyed the land to Eli Johnson by a deed which was recorded on the thirtieth day of the same month. On the fifth day of November, 1869, Johnson conveyed the land to Oliver Wilderman by a deed which was recorded on the next day. On the first day of December, 1879, the land was sold for the delinquent taxes of 1878, and on the second day of January, 1883, a treasurer's deed therefor was executed to the defendant, and recorded on the sixth day of that month. Prior to the year 1884, the land was unimproved and unoccupied. In that year the defendant took actual possession of it, and had one acre thereof broken. In the next year he had ten acres more broken and cultivated. In the summer of the year 1887, one Edwards, acting for the plaintiff,

took possession of the premises. An action of forcible entry and detainer was thereupon commenced by defendant against Edwards, and decided in favor of the latter. An appeal was taken in the case to the district court, and has been continued therein, without determination, to await the final disposition of this case. In January, 1885, the defendant commenced an action in the district court of Sioux county to quiet his title to the land, to which he duly made parties defendant Elam, Johnson and Wilderman, and on the twenty-third day of November following, obtained a decree as prayed. This action was commenced in September, 1887.

The plaintiff contends that at the time of the sale under which the deed to defendant was executed the delinquent tax for which the sale was made was not entered on the tax list of 1879, as required by section 845 of the Code; also, that at the time when the notice of the expiration of the time for redemption should have been served the land was taxed in the name of Wilderman, but that the notice required by law was not served upon him. It is also claimed that the tax sale of 1860, and the tax deeds based thereon, were invalid, for reasons which it is not necessary to state. The defendant denies the alleged defects in the tax deed of 1883, and insists that the plaintiff is estopped to maintain this action. The evidence tends to show that the notice of the expiration of the time for redeeming from the sale of 1879 was defective. Appellee, however, contends that the facts disclosed by the record should estop appellant from asserting any title to the land, and we are of the opinion that the claim is well founded. It is not shown when the land was entered, but it is quite satisfactorily shown that during the period of nearly twenty-eight years, which elapsed from the time of plaintiff's conveyance to Elam until the commencement of this action, the plaintiff, knowing that his interest in the land was not disclosed by the record, stood silently by and saw others, in good faith, discharging the obligations which, if his claims be true,

the law devolved upon him. He states that he watched the land, and examined the records from year to year, and consulted his attorneys in regard to it, and that he knew of the payment of taxes and of the claimants of the land. It follows from what he states that he knew of the first tax sale and of the tax deeds to Stone; that he knew of the conveyance which vested the Stone title in Wilderman; that he knew of the sale and conveyance to Ellsworth, and of the action of the latter to quiet his title against all persons who appeared to have an interest in the land adverse to him; and he knew that defendant took possession of and improved the land. He knew that his alleged interest in the land was neither disclosed nor suggested by the record, for the reason that his deed to Elam did not disclose its trust character, and the deed of Elam to himself was not recorded. He had no reason to think that defendant had any knowledge of his claim to the land, and the defendant did not in fact have such knowledge until June, 1887. By his own act in divesting himself of the title of record, plaintiff had misled defendant as to the true condition of the title, and caused him trouble and expense to quiet it in himself.

In ordinary cases, mere lapse of time might not estop the owner of the fee from asserting his title as against a tax deed issued on insufficient notice, but the circumstances of this case are peculiar. Although it was the duty of appellant to pay all taxes legally levied upon the land while he owned it, he wholly failed to do so. He does not claim that his failure was the result of oversight or misfortune, or other cause which might to some extent excuse the failure. It is true he says he could not get the money to use for that purpose, but the facts which appear of record satisfy us that the reason given was not the true one, and that he failed to pay the taxes and redeem the land from tax sale because until recently he did not deem the land of sufficient value to justify the expense. Instead of being diligent to protect his interests, he concealed them, neglected his duty, and saw others expend money and labor in

acquiring title and improving the land. His purpose seems to have been to carefully observe what was done with the land, with the intent to take advantage of his concealed interest to defeat the title which others supposed they were acquiring, whenever the enhanced value of the land should seem to justify him, from a pecuniary standpoint, in doing so. It is evident that plaintiff has acted in bad faith in this matter, and that to aid him in recovering this land would be to aid in the perpetration of a fraud for the benefit of the person who planned it at the expense of one who has acted diligently and in good faith. Under these circumstances, we will not inquire as to the sufficiency of the tax deeds to Stone and the defendant to convey perfect titles as against all adverse interests. Presumptively, they are sufficient; and, since at the beginning of the investigation it appears that plaintiff is estopped by his own conduct from questioning them as against defendant, we will not go further than to hold that, as between the parties to this action, they are valid.

The decree of the district court is AFFIRMED

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THE STATE OF IOWA, Appellee, v. A. KRIECHBAUM, Appellant.

1. **Intoxicating Liquors**: ILLEGAL SALE: EVIDENCE. In a prosecution for the illegal sale of intoxicating liquors to a person named, the books of an express company showing the dates upon which boxes of goods shipped from the defendant's place of residence to such person were received at the residence of the latter, and that they were delivered to him, and the date of such delivery, is material.

2. ———: ———: OFFENSE COMMITTED IN TWO COUNTIES: JURISDICTION. Where orders for intoxicating liquors are taken by an agent in one county, subject to the approval of his principal in another county of the state, the courts of either county may take jurisdiction of the offense.

3. ——— : ——— : EVIDENCE : BURDEN OF PROOF. Where such prosecution is against one holding a permit under the law to sell intoxicating liquors, and the fact that sales of liquors have been made by defendant is not questioned, the burden of proof is upon him to show that the sales were not in violation of law.

4. ——— : ——— : PRINCIPAL AND AGENT. An agent who solicits orders for intoxicating liquors, subject to the approval of his principal, is subject to prosecution for the unlawful sale of such liquors, though his principal holds a permit to sell under the law.

Appeal from Decatur District Court.—HON. R. C. HENRY, Judge.

FRIDAY, JANUARY 23, 1891.

THE defendant was convicted before a justice of the peace, upon an information charging that in Decatur county, Iowa, on or about April 18, 1889, he unlawfully sold intoxicating liquors to one, Creed Bobbett, and that, in said county, on or about December 26, 1888, he unlawfully sold intoxicating liquors to Henry Otten. Upon appeal to the district court, the defendant was again convicted, and judgment entered against him, from which he appeals to this court.

E. W. Curry and *P. Henry Smythe & Son*, for appellant.

John Y. Stone, Attorney General, and *C. W. Hoffman*, for the State.

GIVEN, J.—The following facts are fully established by the testimony: One A. Hubner was engaged in business as a dealer in intoxicating liquors at Burlington, Des Moines county, Iowa, and held a permit to sell for lawful purposes, which permit, under chapter 71, Acts Twenty-second General Assembly, remained in force up to the September session, 1888, of the district court in that county. Owing to the expiration of his permit, and the fact that, under the laws of Iowa, as they then were, Mr. Hubner could not get a permit, he quit business in Burlington. In September or October, 1888,

Hubner and others organized a corporation, under the laws of Illinois, called the "Dallas Transportation Company," for the purpose of carrying on the business of dealing in intoxicating liquors, Hubner selling his stock to the company. The place of business was at Dallas, Illinois, on the east shore of the Mississippi river, sixteen miles south of Burlington. Hubner was president of the corporation, and had charge of the business, with the assistance of a bookkeeper. Though Hubner continued to reside in Burlington, the stock and books of the company were kept at Dallas. The defendant was in the employ of Hubner until the time he quit business in Burlington, and thereafter with the Dallas Transportation Company, his powers and duties being the same under both employments. He was authorized to travel over certain parts of this state, and solicit orders for intoxicating liquors. When an order was received, he sent it to Hubner, at the place of business, and, if the order was approved, the liquors were shipped from there to the person giving the order, at the place designated. Defendant traveled over his route every five or six weeks, and at each trip was furnished with unpaid bills against customers on his route, for liquors previously ordered and shipped, which bills he collected, and remitted the money to his employer. About July 12, 1888, and at other times prior to September, 1888, Henry Otten gave defendant orders for beer and whiskey at Leon, in Decatur county, upon which the liquors were shipped and delivered to Otten at that place. Other orders were given by, and shipments made to, Otten in the same way after the business was opened at Dallas. Otten sometimes paid for the liquors after delivery at Leon, and sometimes by sending a draft. Sales were made in the same way to C. E. Bobbett before and after Hubner quit business in Burlington, differing only in this, that Bobbett always paid for his liquors at Leon after delivery.

I. The errors assigned and discussed present two questions, namely, whether the court erred in admitting

1. INTOXICATING liquors: illegal sale: evidence.

certain testimony, over defendant's objection, and whether the evidence sustains the conviction. On the trial, certain entries in a book shown to have been kept by the American Express Company in its office, at Leon, were admitted in evidence, over defendant's objection that they were copies of former entries, and immaterial. The witness who kept and identified the book did say that the entries were copies, but, on further examination, showed that they were original entries. They showed the dates upon which boxes of goods shipped from Burlington to C. E. Bobbett were received at Leon, and that they were delivered to Bobbett, and when. These facts were material, as tending to show the sale of liquors to Bobbett, and were originally stated in the entries offered. Therefore, there was no error in overruling defendant's objection.

II. Appellant contends that, as the orders taken by him in Decatur county were taken subject to the approval of his employer at another place, no sales were made in that county, nor by him at any place. A number of cases are cited wherein this court has held that, when orders are taken by an agent at one place, subject to approval by his principal at another place, there is no contract until the order is approved, and that the place where approved is the place of the sale. *Tegeler v. Shipman*, 33 Iowa, 194; *Engs v. Priest*, 65 Iowa, 232; *Gross v. Scarr*, 71 Iowa, 656. The liability of the defendant does not, however, depend upon whether the sales were completed in Decatur county. Section 4159 of the Code provides that, "when a public offense is committed in part in one county, and part within another, or when the acts or effects constituting, or requisite to the consummation of, the offense occur in two or more counties, jurisdiction is in either county." If the sales made on orders approved at Burlington were unlawful, then an offense was committed in part in Decatur county, and part within Des Moines county, and jurisdiction was in either. The orders were taken,

2. ——: ——: offense committed in two counties: jurisdiction.

and liquors delivered and paid for, in Decatur county, and the orders were approved, and liquors shipped, in Des Moines county.

III. We next inquire whether the sales made on orders approved by Hubner in Des Moines county were unlawful. Appellant contends that, as Hubner held a permit at the time, the sales were not in violation of law. That sales were made is not questioned. The burden is, therefore, on the seller to show that they were for authorized purposes. Code, sec. 1549. No such evidence was offered, and the character of the sales was such as to warrant the conclusion that they were not for lawful purposes.

8. —: —: evidence: burden of proof.

IV. We have seen that, in taking the orders subject to the approval of his employer, the defendant did not make a complete sale. Section 1540 of the Code, under which this charge is prosecuted, makes it a misdemeanor for any person not holding a permit to sell intoxicating liquors, and provides that all clerks, servants and agents engaged or employed in the manufacture, sale or keeping for sale, in violation of the chapter, of any intoxicating liquors, shall be charged and convicted in the same manner as principals may be. This defendant was an agent employed in the sale of intoxicating liquors, in violation of the chapter named. To say that he is not amenable to the law, because he did not make a completed sale, would be to put it in the power of two persons, by such a plan of selling, to defeat the evident purposes of the law. It is true, as held in *State v. Douglass*, 73 Iowa, 279, that Hubner could not be prosecuted under section 1540, even if he had made the sales in person, as it is expressly limited to persons not holding a permit; yet he would be amenable, under other sections, if the sales were unlawful. Without now determining how far a permit held by a principal will protect his agent, we are clearly of the opinion that it is no protection as to unlawful sales. Said section 1540 makes all clerks, servants and agents liable who are

4. —: —: principal and agent.

employed or engaged in the unlawful business, regardless of whether the principal holds a permit or not.

It follows, from these conclusions, that there is ample evidence to support the conviction, and it is, therefore, unnecessary that we notice the questions discussed with respect to the sales on orders to the Dallas Transportation Company. The judgment of the district court is AFFIRMED.

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JOHN SHORT, Appellant, v. JAMES L. MATTESON, Appellee.

1. **Sale: WARRANTY: DAMAGES.** In an action for damages for a breach of warranty in a sale of a stallion, warranted to be a "sure colt getter," it was alleged in the pleadings that it was understood by the vendor at the time of the purchase, that the horse was for breeding purposes, and that he knew his warranty to be false. *Held*, that, in addition to the difference between the actual value of the horse when received, and what his value would have been, if according to the warranty, the vendee was entitled to recover, as special damages, the reasonable costs and expenses incurred for advertising, keeping and standing the horse for breeding purposes, prior to the discovery of the breach of the warranty.

2. ——: ——: ——. The right of the vendee to recover in such case is not dependent upon the return of, or an offer to return, the horse, upon the discovery of a breach of the warranty.

3. ——: ——: KNOWLEDGE OF VENDOR. The fact, that a special finding of the jury, that the horse got with foal only nineteen per cent. of the mares served in previous years, is not supported by the evidence, *held*, not material, as such finding went simply to show the vendor's knowledge that the warranty was false at the time of the sale, and such knowledge was not essential to the vendee's right to recover damages, as above stated.

Appeal from Carroll District Court.—HON. J. H. MACOMBER, Judge.

FRIDAY, JANUARY 23, 1891.

ACTION on a promissory note for four hundred dollars. The answer admits the execution and delivery of the note, and avers that the consideration was a certain stallion, which the plaintiff warranted to be a "sure colt

getter;" that there was a breach of the warranty; and also contains averments of general and special damages. The answer, in addition to the warranty, contains averments of fraud on the part of plaintiff in making representations as to the qualities of the horse. The issues to be tried are presented by the answer and a reply containing a denial. The jury, in answer to interrogatories submitted, found specially that there was a warranty, and a breach thereof; that the representations made were fraudulent; that the actual value of the horse when sold to defendant was seventy-five dollars; that the damage for the breach of warranty was three hundred and twenty-five dollars; that the damage, "by reason of false representations," was one hundred and twenty-seven dollars. The jury returned a general verdict for defendant for fifty-two dollars, which the court reduced to forty-two dollars, and gave judgment thereon, for which the plaintiff appeals.

Benj. I. Salinger, for appellant.

Geo. R. Cloud, for appellee.

GRANGER, J.—I. We may facilitate the disposition of the case by first presenting and considering a proposition presented by the appellant as follows: "The vital question, therefore, is, what are legitimate damages upon a breach of the warranty that a stallion is a sure colt getter, admitting for argument's sake that the warrantor knew his warranty to be false? The fraud in this case arises alone from the fact that, in addition to the representations that constitute the warranty, the plaintiff knew them to be false; and, as there is no question of exemplary damages, the rule of damages is the same, whether the recovery is for the breach of the warranty or the fraud. *Likes v. Baer*, 8 Iowa, 370. The district court gave to the jury the following rules to govern in estimating defendant's damage: *First.* The difference between the value of the horse as it actually was received, and what his value would have been, if he had been as

1. SALE: warranty: damages.

warranted ; and, *second*, * * * the reasonable expense, cost and trouble for advertising, keeping and standing the horse during the season for that purpose, and prior to the discovery of the condition of the stallion by the defendant, should be added to the damages indicated in the first division." The appellant's contention is as to the second rule, and he claims that it has no support in the law, and very many cases are cited to show that the rule first given by the court is the correct one. That it is correct as a general rule, that is, as the rule for general damage, there is no doubt, and that is the purport of the cases to which we are cited. But, under the pleadings and proofs of this case, there are two classes of damages,—general and special. The contract price for the horse was four hundred dollars. The jury found the actual value to be seventy-five dollars. With the facts found the law presumes a damage of three hundred and twenty-five dollars, which the jury found, and it is in accord with the rule that appellant concedes to be correct. The damages designated by the second rule are such as may arise, but are not presumed to by the law, and hence they are known as "special damages," and can be proven only when alleged, and, if a proximate result of the breach or fraud, they are recoverable. *Georgia v. Kepford*, 45 Iowa, 48; 2 Greenl. Ev. [Redf. Ed.] sec. 254; *Mann v. Taylor*, 78 Iowa, 355. It is averred in the petition in this case, that, when the horse was purchased, it was understood that he was to be used for breeding purposes, and, if so, his use for that purpose would involve care and expense in thus keeping him, and if, because of the wrongful act of the plaintiff, such expenses were rendered useless, the loss would be the proximate result of the wrong, and such as the parties at the time of making the contract might have contemplated. *Mann v. Taylor*, *supra*; *Joy v. Bitzer*, 77 Iowa, 73, and authorities there cited. These authorities conclusively dispose of the question favorably to the action of the district court.

II. The record discloses that there was an attempt by the defendant to rescind the contract, and that to

2. THE same.

that end there was an offer to return the horse, which was refused by plaintiff, and this point gives rise to many assignments and arguments thereon; but they need not be considered, as other questions control the case in this court. The jury found, upon sufficient evidence, that there was a warranty and a breach thereof, and under correct rules it estimated the damages. The return of the horse, or an offer to, was not essential to the right of recovery for a breach of the warranty. The recovery under the judgment is not the purchase price of the horse, but requires the defendant to pay the actual value of the horse, and retain it, and gives him what he overpaid, with other resulting damages. Regardless of the offer to return the horse, these facts will sustain the judgment. Where a judgment has such support, we need not inquire after errors which could not, if found, be reversible.

III. There is a complaint that the jury found specially that the horse only got with foal nineteen per cent. of the mares served the year before the defendant bought him, and it is said that there is no testimony on which to base such a finding, as there was no proof as to how many mares he served. If the complaint is true, we cannot reverse because of it, for there was testimony on which the jury could, and it did, find that of the mares served the following year, and after the warranty, only fourteen per cent. were with foal. From such evidence the jury could surely find that the horse was not a sure colt getter, and that there was a breach of the warranty. The importance of the testimony, and the facts as to the percentage of mares with foal the previous year, were mainly important as bearing on the question of the plaintiff's knowledge of the fact to show the fraud, which is not essential to support the judgment, as the breach of the warranty may be complete without it.

8. ——: ——: knowledge of vendor.

Many other questions are argued, but the record presents no error for which the judgment should be reversed, and it is AFFIRMED.

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THE STATE OF IOWA, Appellee, v. A. L. SNOW, Appellant.

1. **Constitutional Law**: LEGISLATIVE ENACTMENTS: TITLE. The subject of a legislative act prohibiting the sale of any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, unless it be labeled "compound lard," and designate the name and proportion of each ingredient contained therein, is sufficiently described in the title, "An act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof."

2. ———: POLICE POWER: REGULATION OF TRADE. Such an act as above described is within the police powers of the state, and is not in violation of the constitution of Iowa, article 1, section 9 nor of the constitution of the United States, fourteenth amendment, article 1.

3. **Information**: SALE OF COMPOUND LARD. An information charging a person with selling a bucket or package filled with an article intended for use as lard, which contained other ingredients than the pure fat of healthy swine, and which bucket or package did not bear on the top or outer side thereof the name and proportion, in pounds and fractional parts, of each ingredient contained therein, sufficiently charges an offense under the above statute.

Appeal from Pottawattamie District Court.—HON. C. F. LOOFBOUROW, Judge.

FRIDAY, JANUARY 23, 1891.

THE defendant was convicted upon an information before a justice of the peace for unlawfully selling adulterated lard. An appeal was taken to the district court, where he was again found guilty of the charge, and he appeals to this court.

Wright, Baldwin & Haldane, for appellant.

John Y. Stone, Attorney General, and *Thos. A. Cheshire*, for the State.

ROTHROCK, J.—I. The information charged the defendant with a violation of chapter 79, of the Acts of the Twenty-second General Assembly. The following is a copy of the title of the act and of the first section thereof: "An act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof. Be it enacted by the general assembly of the state of Iowa: Section 1. No manufacturer or other person or persons shall sell, deliver, prepare, put up, expose or offer for sale any lard, or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, in any tierce, bucket, pail, package or other vessel or wrapper, or under any label bearing the words 'pure,' 'refined,' 'family,' or either of said words, alone, or in combination with other words of like import, unless every tierce, bucket, pail, package or other vessel, wrapper or label, in or under which said article is sold, delivered, prepared, put up, exposed or offered for sale, bears on the top or outer side thereof, in letters not less than one-half inch in length, and plainly exposed to view, the words 'compound lard,' and the name and proportion, in pounds and fractional parts thereof, of each ingredient contained therein." It is claimed that the act is unconstitutional because it is in violation of section 29, article 3, of the constitution, which section is as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title such act shall be void only as to so much thereof as shall not be expressed in the title." It is argued at great length that the subject of the act is not expressed in the title, because no reference is made therein to the sale of adulterated lard. It is claimed that lard is the fat of swine after being melted and separated from the flesh, and that any adulteration of lard by the admixture of

1. CONSTITUTIONAL LAW: legislative enactments: title.

other ingredients constitutes a commodity which is not lard. The body of the act prohibits the sale of the admixture without the specified labels. It is contended that, as the prohibited sales are for a substance or articles that is not lard, the subject of the act is not embraced in the title. It is not to be denied that, in the dictionary definition, lard is defined to be the fat of swine. It is contended that the commercial meaning is the same.

We have, we think, fairly stated the grounds upon which counsel contend that the act in question is violative of the constitutional provisions above cited. It is true that the definition of lard is correctly stated by counsel, but when it is attempted to apply technical definitions of words in construing statutes, for the purpose of overthrowing the statute, courts ought to proceed with caution. It is not denied that certain substitutes for pure lard, made up of cotton-seed oil, and possibly other cheaper ingredients, are put upon the market for sale as lard. The title of the act is: "To prevent fraud in the sale of lard." The object of the constitutional provision is to advise the public by the title of the statute of the subject of the legislation, and to prevent provisions from being inserted therein which might escape public attention. The title of this act is a plain statement that it is to prevent fraud in the sale of lard, and the body of the act ought not to be limited to any technical definitions of that word. Counsel for defendant cite a large number of authorities in which it has been held that statutes are void because the subject of legislation is not properly stated in the title. We do not deem it necessary to cite nor to refer to these cases further than to say that they involve questions such as that where, in the title, the subject is stated to be the sale of intoxicating liquors, the act cannot include a provision punishing a person for becoming intoxicated, and an act regulating the sale of intoxicating liquors by its title will not authorize the enactment of provisions therein prohibiting such sale.

In the act under consideration we discover no such departure from the subject stated in the title.

II. It is further contended that the act is unconstitutional because it is an unwarranted interference with trade in an article of food of daily consumption, and is, therefore, in contravention of that clause of the constitution of the state which provides that no person shall be deprived of life, liberty or property without due process of law, and that it is in violation of the fourteenth amendment of the constitution of the United States, which provides "that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Counsel for the defendant cite, in support of their argument, the case of *People v. Marx*, 99 N. Y. 377, as exactly in point on this question. That was a case founded upon a statute which absolutely forbade the sale of oleomargarine as an article of food. The testimony in the case showed that the article sold was not injurious or unwholesome, and that its constituent parts were practically the same as those of butter. The act was held to be unconstitutional and void. It will be observed, however, that there is a marked distinction between that case and this. In this case the law does not prohibit the sale of the article. The act is a mere regulation by which the public may know by inspection of the package the ingredients used in its preparation. If it resembles lard, it is surely no infringement of any right of the grocery-man or dealer to require him to make known to the public, in a proper manner, the constituent parts of the article which he offers for sale. Such a law is clearly within the police power of the state. It is said in the case of *City of Council Bluffs v. Railway Co.*, 45 Iowa, 338: "We fully recognize the doctrine that the state, by virtue of its police power, may enact all such laws as

2. ——: police power: regulation of trade.

may be necessary or proper to protects its citizens in their persons, health and property, to guard them against fraud, impositions and oppressions, even where such laws may, in some respects, affect persons or corporations engaged in the transportation of foreign or interstate commerce, such as quarantine and health laws, all laws to prevent the commission of felonies, misdemeanors or other breaches of the peace." It is apparent, from an analysis of the act under consideration, that it is not an infringement of the right of any citizen. Its provisions are, in substance, just this: If a dealer offers for sale an article intended to be used for lard, he must label it so that the public may not be deceived or defrauded by paying the value of pure lard for a cheaper article. If the dealer will label the article so that the public may know what they purchase, he may deal in it with impunity. This much the law-making power may demand of him without impairing any right of property, or the exercise of any lawful business.

III. It is claimed that the information upon which the prosecution is based does not charge a violation of the statute. Although the statute is somewhat obscure in its meaning, it is quite plain that the penalty therein provided for is incurred, if a person sells a bucket or package filled with an article intended for use as lard, which contains other ingredients than the pure fat of healthy swine, and which bucket or package does not bear on the top or outer side thereof the name and proportion in pounds and fractional parts thereof, of each ingredient contained therein. This is the substance of the information. If the bucket alleged to have been sold did not bear a statement of the ingredients, the offense was complete, no matter whether it was stamped "pure," "refined," "family" or "compound" lard. The information is in the language of the statute, so far as it is necessary to constitute the offense, and that this is sufficient has been many times decided by this court.

8. INFORMATION: sale of compound lard.

AFFIRMED.

CARLTON WHEELER, Appellee, v. W. H. MENOLD *et al.*, Appellants.

Mortgage: RECORD: NOTICE. In an action by a junior mortgagee for the foreclosure of his mortgage, and for permission to redeem from the prior mortgage, the latter relief will not be denied, because, by reason of an extension of time for payment granted the mortgagor, the mortgage debt is not due, where it appears that the plaintiff had neither actual nor constructive notice of such extension of time at the time he received his mortgage.

Appeal from Sac District Court.—HON. JAMES H. MACOMBER, Judge.

FRIDAY, JANUARY 23, 1891.

THIS is an action to foreclose a mortgage. There was a decree granting the relief prayed for in plaintiff's petition. The defendants, who are senior mortgagees, appeal.

W. A. Helsell, for appellants.

R. M. Hunter, for appellee.

BECK, C. J.—I. This case is triable here *de novo*. The facts are these: The plaintiff seeks in this action to foreclose a mortgage on lands executed September 8, 1888, to secure three promissory notes before given. The mortgagee assigned the mortgage to plaintiff, who brings this action, making the mortgagors, Menold and wife, and the senior mortgagees, Capen and Helsell, defendants. These mortgagees separately hold mortgages executed by Menold and wife on the land covered by plaintiff's mortgage. These mortgages were executed and filed for record in 1883 and 1884, before the execution of plaintiff's mortgage. The dates of the execution and recording of the mortgages need not be more particularly stated. The time of payment of the

mortgages executed before plaintiff's mortgage was extended, under an agreement between the mortgagors and the several mortgagees, so that, when this action was begun, the senior mortgagees could not have instituted actions to foreclose their respective mortgages. This extension of time of payment was made by one of the mortgagees by a written agreement, after plaintiff's mortgage was executed, and a like extension was made by the other mortgagee by an oral agreement, but the date thereof does not appear. It is not shown that plaintiff had notice of these extensions of time of payment, either when he took his mortgage or before this suit was brought. The plaintiff, in his petition, asks, in effect, that he be permitted and authorized to redeem from the other mortgages on the land held by defendants, upon paying the amount found due thereon, and that his mortgage be foreclosed. This relief was granted by the decree. The mortgagors did not answer in the court below, and do not appeal. They make no objection to the decree.

II. The defendants, Capen and Helsell, insist that, as the debts secured by their mortgages were not due, plaintiff cannot maintain his action to redeem and foreclose; that, the time for the payment of the mortgages being fixed by contract, plaintiff cannot interfere and require defendants to accept the money due on the mortgages by redeeming therefrom.

III. We need not determine whether, if plaintiff had known when he took his mortgage, or could have been charged with notice, that the payment of the debts had been extended, he could enforce his right to redeem, and foreclose before the maturity of the debts under the new contract. The case, as presented by the abstract, does not show such knowledge or notice. We are to determine whether plaintiff, without such knowledge or notice, is bound by the contract of extension made by the senior mortgagees and the mortgagors.

IV. It is presumed that plaintiff, when he took his mortgage, relied upon the record to disclose the

prior incumbrances, and the dates of their maturity. The holders of these prior incumbrances will not be permitted to unite with the mortgagors, and so change the contract in any particular, that it would prejudice subsequent incumbrancers, having no notice or knowledge of such change. The prejudice resulting to the subsequent incumbrancer in this case is obvious. He is delayed in the foreclosing of his mortgage, and the redemption under it, while the security is being consumed by the accumulation of interest on the debt of the senior mortgage. Jones, Mortg., secs. 730 and 732.

Other points need not be considered. It is our conclusion that the decree of the district court ought to be AFFIRMED.

S. F. LATHROP, Appellant, v. JAMES HALEY *et al.*, Appellees.

Water Right: REMOVING ICE FROM: INJUNCTION. Where a mill-owner owns the water in a river flowing over the land of an adjoining owner, the removal of ice from the river at such point, under license from such adjoining owner, is not such an infringement of the mill-owner's rights as, in the absence of proof of substantial injury therefrom, will entitle him to an injunction.

Appeal from Hardin District Court.—HON. D. R. HINDMAN, Judge.

SATURDAY, JANUARY 24, 1891.

ACTION in equity to enjoin the defendants from cutting and removing ice from the Iowa river. There was a decree dissolving the temporary injunction and dismissing plaintiff's bill. The plaintiff appeals.

Albrook & Hardin, for appellant.

W. J. Moir, for appellees.

GIVEN, J.—The following facts are undisputed: On, and prior to, March 4, 1857, Charles Boyle was the owner of a certain mill lot and property on the Iowa river, in the town of Steamboat Rock, Hardin county, and lands above the mill lot extending across the river. On March 4, 1857, he conveyed the mill property and lands above owned by him, except twenty acres thereof. Following a description of the mill lot and land is a recital that they are conveyed, "together with the water-right of the Iowa river, from the south line of said mill lot to the north line of the southeast quarter of the northeast quarter of section 21, township 88, range 19, west, and all the appurtenances thereto belonging." Subsequently, and after said deed was recorded, Charles Boyle conveyed the twenty acres, of which J. C. McConchie became the owner, January 22, 1876, which twenty acres lay under and on both sides of the river. The flowage caused by the plaintiff's milldam extended back and over said twenty acres. In the month of January, 1888, McConchie granted to the defendants the right to cut and haul ice from off the river or mill-pond over his own land, in pursuance of which they had cut and removed about five tons within the limits of said twenty acres, when the temporary injunction granted herein was served upon them.

The questions presented are as to what rights the plaintiff acquired by his deed as to the ice formed in the river within the limits of McConchie's twenty acres, and whether the removal of ice as being done by the defendants was such a violation of that right as to entitle the plaintiff to an injunction. The plaintiff rests his claim to injunction solely upon his deed, and the fact that McConchie holds by subsequent conveyance from the same grantor. Numerous authorities are cited with respect to the rights of riparian owners that are inapplicable, because not controlled by conveyances from a common grantor. The appellant's contention is, that the plaintiff's rights in the water on or flowing over the twenty acres are the same, whether it be in

the liquid or congealed form; that, by the recital in the deed, "together with the water-right of the Iowa river," Boyle conveyed to him the right to have the water stand upon, and flow over, the twenty acres unobstructed and undiminished by the owner of the twenty acres; that, as McConchie took title under subsequent conveyance from Boyle, he took subject to that right of plaintiff; and that the removal of ice is a violation of his right, in that it lessens the quantity of water with which to operate his mill. Without now determining the true construction of the deed, but conceding it to be as claimed, we inquire whether the removal of ice, as being conducted by defendants, would materially lessen the flow of water to plaintiff's mill; for surely there is no ground for injunction unless there is a substantial injury to be prevented. The plaintiff and Mr. Baker testify that, as a rule, the mill was always short of water, but they do not, nor does any other witness, say that removing ice from the back-water would reduce the supply. It will be noticed that the ice was being taken from the mill-pond, the still water backed up by the dam. The flow from above would soon fill the space made vacant by the removal of the ice; but the argument is that that flow is thereby diverted from passing immediately to the mill. Technically speaking, this may be true, but our inquiry is whether the taking of the ice was a real and substantial injury to plaintiff. We think the testimony fails to so show, and that the decree of the district court should, therefore, be AFFIRMED.

SAMUEL P. WITHROW, Appellant, v. LILLIE M. WALKER *et al.*, Appellees.

Ownership of Land: ADVERSE CLAIMANTS: LACHES: ESTOPPEL. The plaintiff received a conveyance of uncultivated prairie land in the year 1857, in part payment of an antecedent indebtedness. Prior to the execution of such conveyance, the plaintiff's grantor had mortgaged the same property to one C., but this mortgage

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83 441

81 651
89 732

81 651
92 431

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99 82

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115 304

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134 287

81 651
142 237

was not recorded until after the date of the deed to plaintiff: there was evidence tending to show, however, that plaintiff had actual knowledge of the mortgage before the acceptance of his deed. In 1862 the mortgage to C. was foreclosed, the property sold thereunder, and sheriff's deeds were subsequently issued. The plaintiff, however, was not made a party to the foreclosure proceeding. In the year 1868, the purchaser at the foreclosure sale conveyed the property to one M., and he or his heirs paid the taxes on the land for all subsequent years, up to the commencement of this suit, and a part of the land had been broken by themselves or their tenants. All the parties interested were nonresidents, but the plaintiff knew during this time that the taxes were so paid, that M. or his heirs claimed to be owners of the land, and that the same was being improved. In 1864, the plaintiff commenced an action to quiet his title to the land, as against his grantor and C. and M., all of whom appeared and answered, but the plaintiff dismissed the action without a trial on the merits. Another action was commenced by him in 1870, asking to redeem from the mortgage foreclosure, which was dismissed for failure to file a cost bond; and still another action commenced in 1887, against a tenant of M.'s heirs, to recover possession of the land, was dismissed for the same reason. In this action the plaintiff claims that the indebtedness secured by the mortgage to C. is barred by the statute of limitations, offers to pay all taxes that have been paid by M. or his heirs, and demands an accounting, and judgment for the amount in which the rents exceed the taxes. *Held*, that the plaintiff's conduct estopped him from claiming title to the property adverse to the heirs of M.

Appeal from Story District Court.—HON. S. M. WEAVER, Judge.

SATURDAY, JANUARY 24, 1891.

THIS is an action to recover the possession of real estate, and to quiet the title thereto in the plaintiff. The defendants claim to own and to be entitled to the possession of the land, and ask, by way of cross-petition, that their title be confirmed and quieted as against plaintiff. Judgment was rendered in favor of defendants as prayed. The plaintiff appeals.

J. W. Bull, for appellant.

J. L. Dana, for appellees.

ROBINSON, J.—The land in controversy in this action consists of eight hundred acres, situate in the counties of Adair, Greene and Story. On the eighteenth day of March, 1857, George H. Reed, in whom the title to the land was then vested, executed a mortgage thereon, and on two hundred acres of land in Hardin county, which he also owned, to John W. Cooper. The mortgage was given to secure the payments of promissory notes, which amounted, in the aggregate, to fifty-five hundred and forty dollars, and was transferred on the day of its date to the Oxford Female College, at Oxford, Ohio. It was recorded in Story county on the tenth day of June, 1857; in Hardin county on the sixth day of July, 1857; in Greene county on the twenty-seventh day of August, 1860; and in Adair county on the next day. On the seventh day of April, 1857, Reed conveyed the land described in the mortgage to plaintiff. The consideration named in the deed was seven thousand dollars. At that time, Reed was owing to plaintiff the sum of ten thousand dollars, and the conveyance was made on account of that indebtedness. On the twenty-fourth day of April, 1862, the Oxford Female College commenced an action in the district court of Greene county for the foreclosure of the mortgage, making Reed and his wife parties defendant, and serving the original notice by publication. In August, 1862, judgment was rendered in favor of the college for fifty-four hundred and twenty-nine dollars, and a decree foreclosing the mortgage was entered, Reed and wife not appearing. Executions were issued on the judgment, the land was sold thereunder to the college, and sheriffs' deeds executed therefor, and recorded, On the thirtieth day of November, 1868, the college conveyed all the land sold under the degree of foreclosure, including that in Hardin county, to Robert D. Morris. Morris was for a number of years president and financial agent of the college. He died in the year 1882. The record shows that the taxes on the land in question for the year 1857, and all subsequent

years, were paid by Morris and his executors. In February, 1878, he hauled lumber for yard and stable on the Story county land, and, in March, April, May and June of that year, broke one hundred and eighty acres of it. During the next year, he broke twenty acres, and, during the year 1884, he broke seventy acres. After he received the deed from the college, in 1868, he at all times claimed to be the owner of the land until his death, and, since that time, it has been claimed by his heirs. All the persons who have claimed to be interested in the land, as owners, since the year 1857, have been non-residents of Iowa. Prior to the year 1878, the land was unimproved prairie, and not in the actual possession of anyone. The only possession plaintiff ever had was that which the deed to him would confer. In 1864, plaintiff commenced an action in the district court of Story county, to quiet his title to the lands in question, making Cooper, Reed and Morris parties defendant. They appeared, and filed answers, but the case was dismissed by the plaintiff without a trial upon the merits. In the year 1870, plaintiff commenced action in the same court, making Morris defendant, and asking to redeem from the mortgage foreclosure. That was dismissed in the year 1871, on account of the failure of the plaintiff to file a cost bond. A third action commenced, in the year 1887, against J. C. Lee, a tenant, to recover the land in Story county, was dismissed for the same reason. The defendants in this action are the heirs of Robert D. Morris, deceased, and their tenants.

Plaintiff claims that, at the time he received the deed from Reed, he had no knowledge of the mortgage to Cooper, that he was not made a party to the foreclosure proceedings, and had no knowledge of them; that the debt secured by the mortgage is barred by the statute of limitations of the state of Ohio, and of this state; and that he is entitled to an accounting. He offers to pay all taxes that have been paid by Morris and defendants, and demands an accounting and judgment for the amount which the rents exceed the taxes.

The deed of Reed to plaintiff was recorded in Story county in July, 1861. The acknowledgment, however, was so defective that the record of the instrument did not give constructive notice at the time the foreclosure proceedings were commenced. It is insisted by appellant that, although the acknowledgment was defective when recorded, yet the college had actual notice of the existence of the deed; that the acknowledgment and record were legalized by subsequent acts of the general assembly; that the holder of the legal title is necessary to a foreclosure suit, and that a valid decree of foreclosure cannot be rendered until he is made a party; that plaintiff was not made a party to the foreclosure proceedings of 1862, and Reed was made a party only by publication, and failed to appear; therefore, that the court acquired no jurisdiction to render a decree which could affect the title to the land; that Morris and his heirs acquired possession only as mortgagees, and that a possession so acquired and held cannot be adverse to the owner of the fee; that plaintiff has never been challenged to assert or defend his title, and can now claim it.

We do not find it necessary to determine all the questions presented by appellant. It is contended by appellees that the facts disclosed by the record are such that appellant should be estopped from asserting title against them, and we think the claim is well founded. As already stated, plaintiff took the deed from Reed on account of an antecedent debt. He parted with nothing of value at that time, released no security, and entered into no new undertaking. The testimony as to the time when he received the deed is conflicting, some of it tending to show that he received it after the mortgage had been recorded, and with actual knowledge of its existence. His subsequent conduct to some extent sustains that theory. He admits that he regarded the deed as of little value, and made no attempt to pay taxes, or assert any title adverse to the mortgage of Cooper, until he commenced his action of 1864. It is true he had some conversation with Reed and persons representing

the college before proceedings to foreclose were commenced, in which he claimed title, but in those conversations he did not deny that he knew of the mortgage when Reed conveyed the land to him, although it was not mentioned in the deed. Reed told him, in a conversation had in June, 1860, that he had knowledge of the mortgage at the time the land was sold, and his answer was: "Did I?" If he took any trouble to ascertain the fact, he knew that Morris was paying all the taxes as they became due, and in the year 1878, and later, he knew that the land was being improved. He knew in 1864 that the mortgage held by the college had been foreclosed, and that the land had been sold, and sheriffs' deeds therefor executed. He knew after that date, therefore, that the college and its grantees were claiming title not as mortgagees merely, but as owners in fee; and hence that their claim was adverse to him. He recognized the validity of the foreclosure proceedings in 1870, by commencing his action to redeem therefrom. He claims to have abandoned the suits of 1864 and 1870 for financial reasons, but we are satisfied from his own testimony that he had ample means for the prosecution of his suits to judgment. He delayed bringing this suit so long that it is difficult, if not impossible, to ascertain the material facts of the case. He is over ninety years of age, and evidently does not recollect as well as he probably did a quarter of a century ago. His testimony is in some respects conflicting. It is admitted that his principal witness, the attorney who claims to have secured the deed from Reed, is mistaken as to material facts. Reed died in the year 1882, and there is no means of supplying the testimony he could have given. From the year 1863, the defendants, and those through whom they claim, were constantly asserting title adverse to plaintiff, and exercising all the rights, and discharging all the duties, which actual ownership would confer. The sheriffs' deeds created at least such a color of title that, coupled with the requisite possession, it would have ripened into a perfect title by virtue of the statute of limitations. *Slate*

v. Beckey, 79 Iowa, 360; *Railway Co. v. Allfree*, 64 Iowa, 500. The possession taken by Morris in the year 1878 would have been sufficient had he then been a resident of the state. The plaintiff has been negligent for more than thirty years. It is true he commenced two actions at different times, in which he asserted an adverse right, but he abandoned both when defenses were interposed, and for seventeen years remained quiet. His conduct was well calculated to induce Morris and his heirs to believe that he had no faith in his alleged title, and would not urge it against them. The real owner of land may, by his negligence, estop himself from asserting title. *Hall v. Doran*, 13 Iowa, 370. A court of equity "will never interfere in opposition to conscience or good faith. * * * It will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence." *Creath's Adm'r v. Sims*, 5 How. 204. See, also, *Sheldon v. Rockwell*, 9 Wis. 180; *Tash v. Adams*, 10 Cush. 253; *Lucas v. Hart*, 5 Iowa, 419; *Briggs v. Jasper Co.*, 49 Iowa, 483; 1 Pom. Eq. Jur. 465. A court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court. *Brown v. County of Buena Vista*, 95 U. S. 157. See, also, *Bausman v. Kelley*, 36 N. W. Rep. (Minn.) 334; *Sebring v. Sebring*, 10 Atl. Rep. (N. J.) 193 *McCartin v. Traphagen*, 11 Atl. Rep. (N. J.) 163; *Land Co v. Macauley*, 6 S. E. Rep. (Va.) 699; *Sanchez v. Dow*, 2 South. Rep. (Fla.) 844; *Wood v. Egan*, 2 South. Rep. (La.) 191; *Smith v. Thompson*, 7 Gratt. 112; *Le Gendre v. Byrnes*, 14 Atl. Rep. (N. J.) 624. We conclude that, under the circumstances of this case, it would be contrary to the principles of equity to permit plaintiff to recover. His long silence and delay in bringing this action, with knowledge of the adverse acts and claims of the college, Morris and his heirs, raise a strong presumption against him.

He has made it difficult for the court to ascertain the exact truth in regard to various matters in issue. There is nothing shown which tends to justify his conduct, and we are of the opinion that he should not now be permitted to assert a claim adverse to defendants, nor to question their title.

The judgment of the district court is AFFIRMED.

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M. A. ALLEN, Appellee, v. B. P. KIRK, Appellant.

1. **Sales of Personal Property**: FRAUD: EVIDENCE: CROSS-EXAMINATION. While, in an action involving the validity of a sale of personal property, alleged to have been made to defraud creditors, a wide latitude should be allowed in the cross-examination of the parties thereto, yet, where the record shows an extended cross-examination of a party, the cause will not be reversed because certain questions, pertaining to matters of an incidental or immaterial nature, or which were covered by previous inquiries, were not permitted.

2. ———: VALUES: WITNESSES: COMPETENCY. The value of a stock of merchandise cannot be shown by estimates thereof made by persons inexperienced in buying or selling goods in the same line, without examination, and without knowledge as to their quality, quantity or cost.

3. ———: FRAUD: CONSPIRACY: DECLARATIONS OF VENDOR. In such an action, the declarations of the vendor, made under oath, in relation to transactions between him and the vendee, but in the absence of the latter, and after the consummation of the sale, are not admissible in evidence as against the vendee, even under an issue as to a conspiracy between the parties in such transaction to defraud creditors.

4. ———: ———: EVIDENCE. Evidence that, some time prior to the date of the sale in question, the vendee offered twenty-five hundred dollars for a house, and at the time had a large package of money in her hand, *held*, competent as showing the vendee's ability to pay for the goods purchased.

5. ———: ———: INSTRUCTIONS. The defendant asked that the jury be instructed that, if plaintiff's vendor was insolvent, and made the sale in question to defraud his creditors, "and the sale is surrounded with suspicious circumstances in other respects," it is incumbent upon the plaintiff to show, by competent evidence, satisfactory to the jury, that she paid for the stock of goods as claimed

by her; and that the ease and facility with which a fictitious payment may be fabricated require that she produce all the proof which may reasonably be supposed to be in her power of the reality and fairness of the transaction, and that the want of clear proof in this regard, and without any satisfactory explanation as to where the money which she claimed to have paid came from, and how it was obtained, is evidence of fraud, and it is not sufficient that the plaintiff merely make proof of payment, but she must give a reasonable explanation as to where the money came from, and how it was obtained, which she claims to have paid for the stock, as such proof is within her knowledge and power. *Held*, that the instruction called for more than a preponderance of the evidence to establish payment, and was rightly refused.

6. ———: ———: ———. The goods in question having been taken from the plaintiff, under a writ of attachment against the property of her vendor, the jury were instructed that, if the plaintiff purchased for value before the levy, she was entitled to recover therefor, "unless they further found" that the purchase was not in good faith, or that she had notice that her vendor intended to defraud his creditors, or that she had knowledge of facts which should have put her on inquiry, and that would have led to that knowledge, or that she purchased in pursuance of a conspiracy to defraud the creditors of her vendor. *Held*, that instruction was proper.

7. ———: ———: ———: RELATIONSHIP OF PARTIES. In such an action an instruction that "it is lawful for a man to deal with his friends and relations, and that the presumption of law is that such dealings are fair and honest, without any fraudulent intent, and that no presumption of fraud attaches to such dealings," is not erroneous.

8. ———: ———: ———: MINGLING OF GOODS. The intermingling of goods purchased with the intention to hinder, delay or defraud the creditors of the vendor, with other goods belonging to the vendee, will not operate as a forfeiture of ownership in the latter, in the absence of any showing that they are not distinguishable from the goods so purchased.

9. ———: ———: ———: ———. The plaintiff having mingled the goods in question with goods belonging to her husband, but afterwards transferred to her, *held*, that, before the officer serving the writ of attachment could escape liability for a levy upon the latter goods, he must show that he made a reasonable effort to distinguish them and separate them, and was unable to do so, or that, from the nature of the mixture, they of necessity could not be separated.

10. ———: ———: ———: DECLARATIONS. The court instructed the jury "that no evidence of anything said, done or written by the plaintiff's vendor, or the other alleged coconspirators, could be

considered against the plaintiff," unless they found that she had entered into said conspiracy, and that what was said or done was in furtherance of the common design. *Held*, that, in view of the subject of the instruction, it was not to be construed as excluding from the consideration of the jury acts and declarations of the persons named which would be competent as part of the *res gestæ*, though no conspiracy existed.

11. ———: ———: ———: ADMISSIONS. An instruction that, as a general rule, the statements of a witness, as to verbal admissions of a party, should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake, is proper.

12. ———: ———: ———: CONSPIRACY An instruction with reference to each conspirator being bound by the acts of the other further stated that the jury must find that the conspiracy existed as alleged, that the plaintiff was a party thereto, and that the acts and declarations of the conspirators must have been in furtherance of a common design, on the part of plaintiff and the other alleged conspirators, to defraud the creditors of plaintiff's vendor. *Held*, not subject to the objection that it bound the plaintiff by acts and declarations made only after she joined the conspiracy.

13. ———: ———: DAMAGES. The defendant having taken possession of and used the storeroom in which the goods in question were situated at the time of the levy, *held*, that evidence of the plaintiff's leasehold interest in the premises, and of the amount of rent paid thereunder, was competent as an element of damage.

Appeal from Cerro Gordo District Court.—HON. JOHN C. SHERWIN, Judge.

SATURDAY, JANUARY 24, 1891.

ACTION to recover for the wrongful taking and conversion of a stock of merchandise belonging to plaintiff, under writs of attachment in the hands of defendant, as sheriff, against the property of F. T. Fisher. The answer denies that plaintiff owned the merchandise, and alleges that the stock belonged to Fisher, and that the sale thereof by Fisher to plaintiff was made to hinder, delay and defraud the creditors of Fisher, and in pursuance of a combination between plaintiff, Fisher, Charles Allen and Ed. Allen to cheat and defraud the creditors of Fisher. There was a trial by jury, resulting in a verdict for the plaintiff. The defendant's motion for a new

trial was overruled, and judgment rendered on the verdict. The defendant appeals.

Blythe & Markley, *French & Wright* and *Kinsley & Shepard*, for appellant.

R. Wilber and *Cligget & Rule*, for appellee.

GIVEN, J.—The facts in this case are quite numerous, but the following, with those hereafter stated, will be sufficient to an understanding of the questions presented. Fisher was in the boot and shoe business at Austin, Minnesota, and in October, 1888, opened a branch store at Mason City, sent goods there from Austin, and employed the plaintiff's husband, Charles Allen, to take charge of the business, with the assistance of plaintiff as clerk. Charles Allen had a small stock of goods, from which he had been selling at Three Rivers, and which he put into the store at Mason City. Plaintiff and her husband were in charge of the business until November 25, when Fisher sold his stock to the plaintiff, and executed to her a bill of sale reciting the consideration to be forty-six hundred and sixty-six dollars and thirty-three cents, which was originally written fifty-five hundred dollars, and changed at the request of the parties. There is no question but that the plaintiff did then pay money to Fisher for the goods, but appellant claims that it was not her own, but money furnished. directly or indirectly, by Fisher and Ed. Allen, to give seeming fairness to the sale. Much of the contention is as to the sum paid, and whether plaintiff was able to pay it. The plaintiff and her husband continued in possession of the store and goods until December 4, 1888, when the defendant, as sheriff, seized the entire stock as the property of Fisher, under writs of attachment, and thereafter held the same in the storeroom. Charles Allen assigned to the plaintiff his part of the goods, and plaintiff served notice of ownership on the defendant, but he refused to surrender

the goods to her. There is a conflict as to the value of the goods put in the store by Charles Allen, and as to what was done in the way of demand and refusal to separate them from other goods. The seventy-nine assignments of error present inquiries as to certain rulings of the court on admitting and rejecting testimony, in giving and refusing instructions, and in overruling defendant's motion for a new trial. The second assignment embraces eighteen exceptions to rulings sustaining plaintiff's objections to questions propounded to her on cross-examination. To discuss each assignment separately would serve no good purpose, and extend this opinion to an unwarranted length. It will be sufficient that we notice the alleged errors substantially as grouped in the arguments.

I. Appellant complains that he was improperly restricted in the cross-examination of the plaintiff. We recognize the rule that a large latitude should be allowed in such cross-examination, but we think the many pages of cross-examination contained in the abstract show that the defendant was not unmindful of his privilege. The questions to which objections were sustained were either as to incidental or immaterial matters or covered by previous inquiries. The cross-examination of a party, even in such a case as this, must have a limit, and we think, in view of the extended cross-examination, there was no prejudicial error in the rulings of the court on the question embraced in the second assignment of error.

1. SALES of personal property: fraud: evidence: cross-examination.

II. Four witnesses had testified in depositions as to the value of the goods kept by Mr. Allen at Three Rivers. None of these witnesses had any experience in buying or selling that kind of merchandise, and three of them testified from the observation of the goods as seen in the store at Three Rivers, without any knowledge as to their quality, quantity or cost. The other witness, a butcher by trade, had been employed by Allen to look after the store. He had no experience in that line of business, never

2. ——: values: witnesses: competency.

made any estimate of the quantity, quality or value of the goods, and had no knowledge of their value, except as marked for retail. The valuation by such witnesses was a mere guess, and does not attain to that certainty that entitles it to be considered as evidence. There was no error in striking these parts of the depositions.

III. Defendant offered to prove that Fisher, in giving testimony on December 4, 1888, stated that he had shipped the goods to plaintiff in the original packages in which they came from the wholesale dealers; that he received from her forty-six hundred dollars cash; that he told her he wanted the money, and nothing else; that his bills became due soon, and he must have pay for the stock; that he took the money to Austin, but did not deposit it, and lost it in a gambling-house in St. Paul, and did not know where the house was, the name of the proprietor, nor the parties with whom he played; that the sales at Mason City amounted to seven hundred or eight hundred dollars, up to the time he sold out; and that no invoice was taken at the time of the sale to the plaintiff. The further offer was that Fisher testified that, on December 1, he attempted to dispose of his stock at Austin for eighty cents on the dollar to one Bluestone, sent there by, and in company with the bookkeeper of, Ed. Allen, and that one Oaks shoved money from his person over to Bluestone with which to pay Fisher. The plaintiff's objection to the testimony was sustained. The practice of counsel, stating in the presence of the jury what they offer to prove, is not entitled to favor. Every practitioner knows that this practice is sometimes resorted to for the purpose of getting before the jury statements that are not admissible, in the hope that the jury may not discriminate between such statements and the testimony. The better practice is to present the offer by interrogatories, as, in most instances, the admissibility of the offered testimony can be fully raised by a few questions. If this is not practicable, the offer may be

8. ——: fraud: conspiracy: declarations of vendor.

stated to the court in writing, and made a part of the record. By the practice suggested, the result in the case is placed beyond the suspicion of having been reached by statements not admitted in evidence. There is nothing in the record in this case to indicate that the practice we condemn was resorted to. It does not appear that the offer was made in the presence of the jury; that itexceeded what appeared in the written testimony of Fisher, nor that it was not made in writing. Appellant's contention is that these statements of Fisher were admissible, as tending to show an intent on his part to hinder, delay and defraud his creditors, and as the declarations of a coconspirator. It will be observed that Fisher is not a party to this action; was not a witness; that the statements offered were not made until nine days after the sale to plaintiff; were made in her absence; and were as to past transactions. That the statements were made under oath, does not affect the question of their admissibility. These statements were no part of the transaction with the plaintiff. The sale to her was fully completed. The alleged intent to defraud the creditors of Fisher by the sale, whether in pursuance of a conspiracy or otherwise, had, if it existed, been fully consummated, and, therefore, the statements are no part of the *res gestæ*. *Bogart v. Phelps*, 14 Wis. 95; *Hamilton v. Lightner*, 53 Iowa, 470; *Guaranty Co. v. Gleason*, 78 N. Y. 515; Bump. Fraud. Conv. 580. The general rule is that statements made by a grantor, after he has parted with his title, tending to impeach his grantee's title, are not admissible. An exception to this rule is where the grantor and grantee conspire together to defraud third persons. *Kennedy v. Divine*, 77 Ind. 491; *Williams v. Eikenbury*, 41 N. W. Rep. (Neb.) 770; *Bank v. Corcoran*, 2 Pet. 121. Under this rule, the statements offered are inadmissible unless they come within the exception. Declarations of conspirators are only admissible as a part of the *res gestæ*. Bump, Fraud. Conv. 584; *Guaranty Co. v. Gleason*,

supra. As already stated, the making of these statements was no part of the *res gestæ*. The declarations, to be admissible, must have been "made in the execution of the common purpose, and in aid of its fulfillment." Wait, Fraud. Conv., sec. 280. The common purpose to hinder, delay or defraud the creditors, if it existed, was consummated when the sale was made, and these statements are not made in aid or execution of it. We see no error in excluding the offered testimony.

IV. There was no error in overruling the motion to strike from the deposition of Cannon. In answer to

4. —: —: evidence. the question: "State any other fact you know of interest to the plaintiff," he said that, in 1887, she offered twenty-five hundred dollars for a house, and at that time had a large package of money in her hand. This testimony was admissible as bearing upon the question of plaintiff's ability to pay Fisher for the goods. We do not deem it necessary to discuss the other errors assigned and argued as to admitting and rejecting testimony. We have examined each assignment with care, and are satisfied that the exceptions are not well taken.

V. Appellant complains of the refusal to give the first, second, fifth, eighth, ninth, tenth, eleventh and

5. —: —: instructions. fourteenth instructions asked. The first is to the effect that, if Fisher intended to defraud his creditors, and plaintiff knew of circumstances which would have put an ordinarily prudent person upon inquiry that would have discovered the fact, then the burden is on plaintiff to show that she purchased in good faith, for value, without notice of the fraudulent intent. The third recites circumstances claimed to be proven, as that the purchase was for less than the real value; that no invoice was made; that Fisher was insolvent; and that, if plaintiff knew, or could have known by ordinary inquiry, of his insolvency, then the circumstances shown are to be considered in determining whether or not the sale was fraudulent. The fifth is to the effect that, if Fisher intended by the sale to defraud his creditors, and the

plaintiff participated in, or knew or had notice of, such fraudulent intent, before or at the time she purchased, the defendant is entitled to recover. The eighth that, if Fisher made the sale with intent to defraud his creditors, and such purpose was known to plaintiff at the time of the purchase, and she participated therein, she took no title to the property, although she paid full value therefor. These instructions are substantially embraced in the third, fourth, fifth and seventh paragraphs of the instructions given.

The ninth instruction refused is that if Fisher was insolvent, and made the sale to defraud his creditors, "and the sale is surrounded with suspicious circumstances in other respects," it is incumbent on the plaintiff to show, by competent evidence, satisfactory to the jury, that she paid for the stock of goods, as claimed by her; and the ease and facility with which a fictitious payment may be fabricated require that she produce all the proof which may reasonably be supposed to be in her power of the reality and fairness of the transaction; and the want of clear proof in this regard, and without any satisfactory explanation as to where the money which she claimed to have paid came from, and how it was obtained, is evidence of fraud, and it is not sufficient that the plaintiff makes merely proof of payment, but she must give a reasonable explanation as to where the money came from, and how it was obtained, which she claims to have paid for the stock, as such proof is presumptively within her knowledge and power. This calls for more than a preponderance of evidence to establish the payment. The rule as to the burden of proof, and as to what is preponderance of evidence, was fully stated in the instructions given.

The tenth instruction refused recites circumstances going to the weight to be given to the testimony of the plaintiff, such as her interest, contradictory statements, and that the preponderance of evidence is not necessarily determined by the number of witnesses. The entire substance of this instruction was also embraced in those given. The eleventh is a restatement, in part,

of the rule where the purchaser has knowledge of facts such as should charge her with notice of the seller's fraudulent intent. As already stated, that subject is fully covered in instructions given. The fourteenth asked is that relationships between witnesses and the party should be considered in weighing their testimony. The only reference to this subject is in the eleventh paragraph of the charge, wherein the jury are directed to consider the interest of the witnesses, their conduct while testifying, their apparent fairness or bias, appearance on the stand, reasonableness of the testimony, etc. Relationship is not directly mentioned, yet a jury would understand that as a fact to be considered as affecting their interest, fairness or bias.

VI. Appellant complains of paragraphs 5, 5½, 8, 9 and 10 of the charge. In the fifth paragraph, after stating that the law presumes that all persons transact their business honestly, and in good faith, until the contrary appears; that it is lawful for a man to deal with his friends and relations, and that the presumption of law is that such dealings are fair and honest, without any fraudulent intent, and that no presumption of fraud attaches to such dealings,—the court directed the jury that, if they found that the plaintiff purchased the goods from Fisher, for a valuable consideration, before the levy of the attachment, "she will be entitled to recover in this action, unless you should further find" that the plaintiff did not purchase in good faith, or that she purchased with notice that Fisher intended to defraud his creditors, or of facts that should have put her upon inquiry that would have led to that knowledge, or that she purchased in pursuance of a conspiracy, on the part of herself and the others named, to defraud the creditors of Fisher. Appellant's objection is that the language "or unless you further find" might be understood as meaning "nor unless you further find." The language is not susceptible of such construction. The jury are told that the plaintiff is entitled to recover, if she purchased for value, before the levy, unless she did so in

6. THE same.

pursuance of a conspiracy, as alleged, or with knowledge of an intent on Fisher's part to hinder, delay or defraud his creditors, or of facts that should have put her upon inquiry that would have led to that knowledge.

VII. The further complaint is that the statement as to the right of friends and relatives to deal together is not the law. We are aware of no law which prevents friends and relatives from buying and selling between each other, or that creates any presumption of fraud from the mere fact of their dealing. When fraud is charged, the relation of the parties is proper to be considered. We see no error in the instruction.

7. —: —: —: relationship of parties.

VIII. The court instructed in paragraph 5½ that, if defendant levied upon and took goods which were then the property of Charles Allen, and purchased by plaintiff before the commencement of this suit, plaintiff was entitled to recover the reasonable market value thereof. Aside from any question as to the mixing with, and the separation of these goods from, the Fisher stock, the instruction is correct. On the subject of mixing and separating, the court instructed, in paragraph 9, that, if the sale by Fisher to plaintiff is void, and she intermingled other goods for the purpose of hindering and delaying the creditors of Fisher, and was given an opportunity by defendant to separate her goods, and failed or refused to do so, then the defendant is not liable therefor; but, if defendant refused to permit her to make such separation, then he would be liable, if a demand was made by plaintiff for such goods. Appellant contends that, if the goods were mixed for the purpose of hindering and delaying the creditors of Fisher, plaintiff was not entitled to a separation. There is no forfeiture of ownership, except where one wilfully intermingles his property with that of another so that it becomes impossible to distinguish what belongs to one and what to another. 2 Kent, Comm. 365. It is not contended that these goods were not distinguishable. The plaintiff, and probably others familiar with the goods, were able to

8. —: —: —: mingling of goods.

distinguish them. The purpose of hindering and delaying the creditors of Fisher would not work the forfeiture of the goods.

IX. In paragraph 7, asked by plaintiff, the court further instructed that, if the plaintiff mixed goods belonging to her husband with the Fisher stock, before she had notice that Fisher's creditors designed to assail her purchase, the defendant was not justified in levying on such other goods, if he had notice that she claimed the goods other than the Fisher stock, and that, before he could escape liability, "it should be shown that he made reasonable effort to distinguish and separate them from the Fisher goods, and that he could not, by reasonable effort, get the information that would enable him to so distinguish them, and, therefore, could not separate them, or that, from the nature of the mixture, they, of necessity, could not be separated." It appears from the verdict of the jury that they must have found that the sale from Fisher was not fraudulent, and in that case the question of the separation of the Charles Allen goods becomes immaterial. We think, however, that the instructions, taken together, correctly announce the law. See *Pulcifer v. Page*, 54 Amer. Dec. 582, and notes.

9. THE same.

X. In the eighth paragraph, the court, after defining conspiracy, directed the jury that, if plaintiff purchased in pursuance of a conspiracy, as charged, she could not recover; that, if such a conspiracy did exist, and plaintiff was one of the conspirators, then the acts and declarations of any of her coconspirators, said and done in the execution or furtherance of the common purpose, would be deemed to be said or done by all, "but that no evidence of anything said, done or written by either T. F. Fisher, Ed. Allen or Charles Allen can be considered against the plaintiff, unless you find from the evidence that she had entered into said conspiracy," and that what was said or done was in the execution or furtherance of the common design. The complaint is that this excludes all the acts, declarations and writings of Fisher, Ed.

10. —: —: —: declarations.

Allen and Charles Allen. One defense is that the sale to plaintiff was with intent, upon the part of herself and Fisher, to thereby hinder, delay and defraud his creditors. Acts and declarations, forming part of the *res gestæ*, are clearly proper testimony, even if there were no conspiracy. We do not think that, viewed in the light of its subject-matter and accompanying instructions, that paragraph will bear the construction given it. It relates exclusively to the defense of conspiracy, and could not be understood as withdrawing what was said and done in the presence of plaintiff, and in consummation of the sale.

11. —: —: —: admissions.

XI. In the tenth paragraph, the jury were instructed "that the verbal admissions of a party to a suit, when made understandingly and deliberately, often afford satisfactory evidence; yet, as a general rule, the statements of a witness, as to verbal admissions of a party, should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake. This is within the rule as laid down in Greenl. Ev., sec. 200; *Martin v. Algona*, 40 Iowa, 390, and generally recognized in the authorities. It does not instruct that admissions understandingly and deliberately made are subject to imperfection and mistake, but that the imperfections of such evidence is in the statement or recollection of the witness as to the verbal admissions.

12. —: —: —: conspiracy.

XII. Appellant complains of the modification of the sixteenth instruction asked by defendant. The instruction asked lays down the rule as to each conspirator being bound by the acts of the other, and the modification is that the jury must find that the conspiracy existed as alleged, and that the plaintiff was party thereto, and that the acts and declarations of the conspirators must have been in furtherance of a common design, on the part of plaintiff and the other alleged conspirators, to defraud the creditors of Fisher. This modification made the instruction to present the entire subject to the minds of the

jury in accordance with the law. It does not, as contended, only bind the plaintiff by acts and declarations made after she joined the conspiracy.

XIII. There was no error in submitting the question of damage for the leasehold interest of plaintiff in the storeroom. There was evidence tending to show that she had such an interest, the amount of rent to be paid, and that it had been paid, and that defendant took and used the room. The pleadings are broad enough to include the Charles Allen goods. The defendant took the entire stock, including these goods, and plaintiff claims the entire stock; hence the question as to the Charles Allen goods was not outside the issues.

13. ——: ——: damages.

XIV. Appellant attacks the instructions as a whole, as ambiguous, uncertain, confusing, and for other causes. We have examined them with care, and are of the opinion that they fully and fairly presented the case to the jury. Another complaint is that the verdict is the result of passion, prejudice or error, and is excessive. While there is much in the testimony bearing against plaintiff's right to recover, there is not such an absence of testimony to support the verdict as to justify this court in interfering therewith.

The case was fully and fairly submitted, and, the jury having found as under the law and the evidence they might, the judgment of the district court should be AFFIRMED.

T. H. WOODBRIDGE, Appellee, v. JOHN G. AUSTIN, Appellant.

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Wrongful Detention of Real Property: EJECTMENT: DAMAGES. Where in an action for the possession of certain real estate, and for damages for the wrongful detention thereof, the question of ownership has been determined by the court, sitting as in equity, in favor of the plaintiff, the question of damages for the wrongful detention need not be submitted to a jury if the evidence discloses no dispute as to the facts upon which the recovery therefor is based.

Appeal from Sac District Court.—HON. J. P. CONNER, Judge.

SATURDAY, JANUARY 24, 1891.

ACTION for the possession of real estate, and damages for wrongful detention. The answer admits that the plaintiff is the holder of the legal title, and states an equitable affirmative defense, and a denial of the allegations of the petition not admitted. The ony allegation of the petition put in issue by the answer is that of damages for wrongful detention. The equitable issue on which the right of possession is to be found involves the fact of the actual ownership of the land. The defendant moved the court for an order that the equitable issues raised by his answer be first tried by equitable proceedings, whereupon the court made the following order: "Cause set for trial upon written evidence in form of depositions or oral testimony at trial, as parties may elect, in whole or in part. This refers to equitable issues raised by answers." Afterwards the parties placed on record the following: "It is hereby agreed and stipulated by and between the parties hereto that, in case defendant fails to establish his defense set out in the above-entitled cause, the plaintiff may have judgment for possession." The cause was afterwards submitted to the court on evidence, and judgment was entered as follows: "That the plaintiff have and recover of defendant the possession of the land in controversy; that the title thereto is in the absolute and unqualified ownership of plaintiff; that plaintiff have judgment for the sum of two hundred dollars, rents and profits of said land, and for costs, taxed at —— dollars. To all of which defendant duly excepted. From the judgment the defendant appeals.

Goldsmith & Hart, for appellant.

James H. Tait and *W. A. Helsell*, for appellee.

GRANGER, J.—The only complaint made on this appeal is that the court erred in entering judgment for rents and profits of the land, because the issues in relation thereto were triable by ordinary proceedings, and to a jury, unless waived. The stipulation of the parties, and the law in its absence, required that, if the equitable issue was found against defendant, judgment for the possession of the land must be entered for the plaintiff, and the judgment would carry with it a right to damage for wrongful detention, which in this case is the value of rents and profits. The only remaining question then, after settling the equitable issue, was the value of the rents and profits. It may be admitted for the purposes of the case, that, if the question involved a dispute as to facts or amount, it should have been submitted to a jury. Are we then to infer such a dispute? The pleadings fairly present such a question, but the record shows that, on the trial, evidence was taken as to the rents and profits, and the judgment of the court shows the same fact. Now, let us suppose the evidence such as to place the amount of damage beyond dispute, as that both parties testified that the value of the rents and profits was the value found by the court. In such a case there would be no question for a jury; the fact would be treated as established; and the law would not encourage the idle form of changing the forum to conclude the trial. No part of the evidence is in the record, and we will assume, in its absence, its sufficiency to sustain the action of the court where its action is based thereon. It may be said that no complaint was made to the district court of its action, nor was there an intimation of a desire to try any question to a jury, and likely because there was none to be so tried.

The judgment is AFFIRMED.

JOHN CAREY, Appellant, v. DES MOINES CO-OPERATIVE COAL & MINING COMPANY, Appellee.

Corporations: CONTRACTS: LIABILITIES. An unincorporated coal and mining company, having become insolvent, and most of its property having been seized by attaching creditors, it was agreed, at a meeting of its members, that they organize a stock company for the conduct of the same business, and that it should assume and pay the debts of the old company. It was further agreed, at such meeting, that the plaintiff, a member of the old company, should receive, in consideration of a part of its indebtedness to him, paid-up stock in the proposed corporation. Such corporation was organized, but it received no property of value from the old company, and it never ratified the above agreements of that company. *Held*, that the old company's promise of stock to the plaintiff could not be enforced against the new company, nor was it liable for the balance of his account against the old company, because of the latter's agreements.

Appeal from Polk District Court. — HON. W. F. CONRAD, Judge.

MONDAY, JANUARY 26, 1891.

ACTION for an accounting, to compel defendant to issue a certificate for stock, and to recover a balance alleged to be due. There was a trial by the court, and a judgment in favor of defendant for costs. The plaintiff appeals.

C. P. Holmes, for appellant.

R. N. Baylies, for appellee.

ROBINSON, J.—In September, 1886, the plaintiff and nine other persons associated themselves together, under the name of the United Coal Company, for the purpose of mining and selling coal. The company was not incorporated, but it was agreed that, if certain land for which they proposed to procure a lease should prove to be good mining property, and the enterprise should seem

to be successful, the members of the company would incorporate on or before the first day of June, 1887. Each member of the United Coal Company was to contribute to the capital as much as each of the others contributed, and was to share equally with the others in its profits. All the members were, or claimed to be, practical coal miners, and each was to be employed in the mines and business of the company, and was to have an interest in its property and business in proportion to the amount he contributed to its capital, including wages earned but not drawn. The company procured a lease of Mrs. L. G. Bleckman, as proposed, when the organization was effected, for certain lands, including an old coal mine and its appurtenances, for a term of eight months and five days, ending on the first day of June, 1887. The property leased included the mine, shaft, fixtures, buildings, cars and machinery. The lease provided for the payment each month of a royalty on the coal mined; for a forfeiture of the lease upon a failure to comply with any of its provisions, and for a renewal of the lease to such corporation as the members of the company might form, or to which they should assign their interest, for the term of twenty years. After procuring the lease, the company removed the water from the old mine, cleaned it out, and put it in order, and commenced taking out and selling coal. It operated the mine until about the first of March, 1887; the plaintiff acting as treasurer, and rendering such other service as was needed. He purchased scales, horses, harness, timber and other articles, including tools needed in the opening and operating of the mine. On the first of March, 1887, plaintiff had paid for the company, in addition to what he had received, the sum of six hundred and fourteen dollars and forty cents, besides eighty-one dollars he had paid on account of stock. The company was also indebted to others, and a writ of attachment was levied upon some of its personal property used at the mine. After some preliminary negotiations, several members of the United Coal Company adopted articles of incorporation, dated March 4, 1887,

which were to take effect on the seventh day of that month; and the defendant was thus organized. Its object was to deal in coal lands, and to prospect for, mine and sell coal. The new company procured a new lease from Mrs. Bleckman for the property originally leased to the old company, and commenced the business for which it was organized.

The plaintiff contends that, at a meeting of the members of the old company, held on the third day of March, 1887, and at other times prior to that date, it was agreed that the company to be organized should assume and pay the debts of the United Coal Company, and that a certificate for paid-up shares of stock in the new company to the amount of five hundred dollars should be issued to plaintiff in payment of that amount of his claim against the old company, and that he is now entitled to such a certificate and to a judgment, in addition, for the sum of one hundred and ninety-five dollars and forty cents. There is much conflict in the evidence as to what was said and proposed, pending the organization of the new company, but we think a fair preponderance of the evidence shows that propositions of the nature claimed by plaintiff were made, and that at one time it was understood by the parties in interest that they would be adopted, and the debts of the old company be paid by the one to be organized. But it appears that Mrs. Bleckman declared a forfeiture of the old lease for non-compliance with its provisions by the United Coal Company before the defendant was organized; that she executed a lease to defendant for the same property, but on different terms; that the new lease required a cash payment of three hundred dollars for the shaft, which was not required by the old lease, and which was paid by defendant; and that defendant has never in any manner ratified the alleged agreement of members of the old company to assume and pay its debts, and to issue a certificate of paid-up stock to plaintiff. We do not find that defendant has received much, if any, benefit from the property of the old company. The lease it now holds was not obtained by virtue of

the old lease, but was the result of a new agreement made by the defendant with Mrs. Bleckman. The personal property was in large part, if not wholly, seized and sold by a creditor of the old company. The mine and appurtenances were, doubtless, in much better condition, because of the money and labor expended upon them by the old company; but that company had forfeited all right to them, and, so far as the record discloses, Mrs. Bleckman may have realized all benefits which could be derived from the improvements in the increased price which she exacted of defendant for the new lease. However that may be, plaintiff has failed to show any obligation on the part of defendant to execute to him any certificate for stock, or to pay him anything on account of disbursements he has made.

The judgment of the district court is AFFIRMED.

IRA P. WETMORE, Appellant, v. HENRY MARSH *et al.*, Appellees, AND D. M. MCFARLAND, Appellant.

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1. **Mechanic's Lien**: ACCOUNT: SUFFICIENCY. A statement of an account in the language and form peculiar to the trade in a given class of materials is a sufficient compliance with the requirement, that a statement for a mechanic's lien shall be accompanied with an account of the items forming the basis of the claim for a lien.

2. ——: AFFIDAVIT: JURAT: SIGNATURE. Where a paper purports to have been prepared for filing with the district court, and the law requires it to be so filed, a jurat to an affidavit therein which is signed by one who describes himself merely as "clerk" is sufficient.

3. ——: STATUTE OF LIMITATIONS. A non-resident of this state cannot avail himself of the statute of limitations as a defense to an action commenced here.

4. ——: MORTGAGE: SUPERIOR EQUITY. The fact that money obtained by mortgage upon real estate is applied in payment thereof will not entitle the mortgagee to a superior equity over a mechanic's lien for materials furnished for a dwelling erected thereon, where the mechanic's lienholder was in no manner a party to the former transaction.

5. ———: CONTRACT: EXTRAS. A contract for furnishing materials for the erection of a house, generally, includes extras, and will support a mechanic's lien for the whole.

6. **Account**: ASSIGNMENT: EVIDENCE. Evidence that a firm asserting ownership to an account is the successor in business of the firm with which the account was contracted, the former firm being composed of two out of three of the copartners comprising the latter firm, is sufficient proof of ownership of the account.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

MONDAY, JANUARY 26, 1891.

THE plaintiff brings this action in chancery to foreclose a mortgage executed by defendant, Marsh. Ewing, Jewett and Chandler were made defendants, and answered that they did hold a mechanic's lien against the property covered by the mortgage, which they had transferred to their successors in business, Ewing and Jewett. The mortgagors failed to answer, and default was rendered against them. Ewing and Jewett intervene, showing that they hold a mechanic's lien on the property for lumber furnished by them, and used for building a house upon the property, and ask that it be foreclosed. D. M. McFarland was made a defendant by Ewing and Jewett, and, appearing in the case, shows that he holds a mortgage upon the property which is superior to the mechanic's lien of the intervenors. The court below found that the mechanic's lien was superior to the mortgages of plaintiff and McFarland, and so decreed. There is no controversy between the mortgagees as to priority of their respective mortgages. The plaintiff and defendant McFarland, the mortgagees, appeal.

H. E. Long, for appellants.

Smith & Morris, for appellees.

BECK, C. J.—I. There is no controversy between the appellants, and they unite in opposition to the

claim of Ewing and Jewett to establish a mechanic's lien. We shall notice their objections to the decree of the court below in the order presented by counsel. It is first insisted that no statement and account of the materials furnished, for which the lien is claimed, was verified and filed, as required by statute for mechanics' liens. The first ground of this objection is based upon the claim that the account setting out the materials furnished is insufficient. It is insisted that the account is indefinite, and does not show by sufficient description what materials are intended to be specified. The account shows that Ewing and Jewett are lumber merchants, and the claim for the lien filed with the account, in the office of the clerk of the court, shows that the materials charged consisted of lumber used in building a house. The account is made out in the usual manner of bills and accounts of lumber. The first item is in this form:

1. MECHANIC'S LIEN: ACCOUNT: SUFFICIENCY.

"1886.

"May 25	60	2	4	16	
	12	"	"	12	
	3	2	8	16	S. S.
	31	2	8	16	Rgh.
	9	"	"	12	
	20	2	4	16	
1000 ft. Dr.			Sheetg.		
	20	2	4	10	
	9	"	"	14	$52.36."

This item being understood to describe building materials, as is shown by the statement filed with the clerk, describes in form and language used in such cases the kind of lumber delivered. The first line of the item is interpreted as follows: "Sixty pieces, two inches by four inches, sixteen feet long." The abbreviations and letters following the lines indicate the condition, whether rough surfaced or dressed, and other description. No complaint was made in the court below based upon this objection. Had the account appeared to the district court as unintelligible, evidence could have been admitted to interpret it as being language peculiar to trade. 1 Greenl. Ev., secs. 277, 278,

280. We do not require such evidence, as the account can be readily read and understood by us.

II. It is next insisted that the claim for a lien is not sufficient, for the reason that the purport of the affidavit verifying it does not show that it was sworn to, being signed thus: "L. A. Wilkinson, Clerk." The paper was prepared for the district court, where the law required it to be filed. It is the case of a paper to be deposited with the clerk just as records and other papers in actions or special proceedings are to be filed with him. In these cases the clerk need not give his full official title, for it will be understood that he is the clerk of the court or county in which such proceedings are pending. The venue of the jurat shows the county and the court, and the signature of the officer shows that he is the clerk. It will be presumed by the law that he is the clerk of the court. *Ewing v. Folsom*, 67 Iowa, 65. The district court knew judicially its clerk (*Finn v. Rose*, 12 Iowa, 566), and the word "clerk" added to the name of the officer means that he is the clerk of the court in which the proceeding is pending. Code, sec. 45, par. 25. The lien proceeding was pending in the clerk's office, for the papers therein were there deposited. The word "clerk," appearing after the name of the officer, designated him as the clerk of the court in whose office the claim for the lien is filed.

2. ——: affidavit: jurat: signature:

III. It is maintained that a payment was made upon the account of one hundred and seventy dollars, which should be applied thereon as a credit. The evidence plainly shows that this payment was, by direction of the purchaser of the property, applied upon another indebtedness which he owed Ewing and Jewett. These remarks dispose of this point.

IV. It is next urged that the evidence fails to show that the lumber was used in erecting a building upon the lot involved in this suit. We think differently. While the evidence is not as plain as it might be, as to the precise locality where the lumber was delivered, it appears quite satisfactorily that it was used

in erecting the house upon the lot charged in the proceedings for the lien. There is no sufficient evidence leading to a different conclusion.

V. McFarland set up the statute of limitations against the mechanic's lien. He was made a party to the action more than a year after the petition to foreclose the mechanic's lien was filed. He claims that the action as against him is barred. But it appears that he is, and has been, a non-resident of the state, and cannot, therefore, invoke the statute of limitations. His counsel thinks the evidence fails to show that he is a non-resident. We think it is quite plainly established by the evidence.

3. ——: statute of limitations.

VI. It is claimed that certain money was obtained by Marsh from McFarland to pay to Wetmore on the purchase of the land. It is argued that this fact gives McFarland an equity over the mechanic's lien. We are utterly unable to discover force in this position. Ewing and Jewett had nothing to do in changing the condition of the other parties, or with the transaction between these parties. Ewing and Jewett are shown to be guilty of no fraud, and are bound by no contract with McFarland or others affecting their rights in this regard.

4. ——: mortgage: superior equity.

VII. Counsel for plaintiffs insist that a part of the materials called "extras" were contracted for subsequently to the first contract. We think the original contract was for the materials for the house generally, and not limited to a part of it.

5. ——: contract: extras.

VIII. Counsel claim that Ewing & Jewett failed to show an assignment from Ewing, Jewett & Chandler of the claim for the lumber. We think it appears that the last-named firm was the successor of the first by the change of the copartnership, Chandler going out of the firm. This evidence sufficiently establishes the transfer to the last firm.

6. ACCOUNT: assignment: evidence.

These considerations sufficiently dispose of all questions in the case. The decree of the district court is AFFIRMED.

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DANIEL CORBIN, Appellant, v. W. T. MINCHEN, Appellee.

Homestead: CONVEYANCE OF: VALIDITY. **A husband and wife purchased eighty acres of land, and occupied the same with their children for about six months, when the husband absconded because of the commission of a criminal offense. About four months later the wife sold the property to one U., giving her individual warranty deed therefor, and soon afterwards surrendered possession of the premises. Subsequently the husband, having returned home, executed to U. a quitclaim deed to the property. About three years afterwards, with constructive notice of both of the above conveyances, and while U. was in actual occupation of the premises, the defendant obtained a quitclaim deed to said land from U.'s grantors, in which both the husband and wife joined. *Held*, that the separate conveyances of the husband and wife to U. were sufficient to divest them of all title to the land conveyed, and that the defendant, having taken his deed with constructive notice of U.'s rights, acquired no title thereby to the property.**

Appeal from Audubon District Court.—HON. H. E. DEEMER, Judge.

MONDAY, JANUARY 26, 1891.

THIS is a suit in equity to quiet the plaintiff's alleged title to a farm of eighty acres in Audubon county. The defendant, by his answer, denied the plaintiff's title, and claimed to be the owner of the land, and prays that his title be quieted as against plaintiff. He also seeks to recover the rents and profits of the land. There was a hearing on the merits, and a decree for the defendant, which included the sum of one hundred and sixty dollars for the use and occupation of the land. The plaintiff appeals.

Cole, McVey & Clark, for appellant.

Geo. W. Paine, for appellee.

ROTHROCK, J.—The facts pertaining to the claims of the respective parties to the land, so far as they

appear in the record, are not the subject of dispute. They are in substance as follows: One George D. Grove was formerly the owner of the farm. On the sixth day of March, 1883, he conveyed the same to Elizabeth Breckenridge, and the deed of conveyance was filed for record on the eighth day of the same month. Elizabeth Breckenridge, with her husband and two children, resided in a dwelling-house on the land from the spring of 1883 until January 1, 1884, and they cultivated and raised crops on the premises in the year 1883. In September or October, 1883, said Charles Breckenridge left the state because of a criminal charge against him, and did not return until May, 1884. On the tenth day of December, 1883, Elizabeth Breckenridge sold and conveyed the premises by warranty deed to George and Henry Umphrey, and said deed was filed for record the next day. Soon after making said conveyance, Mrs. Breckenridge removed from the premises. On the thirtieth day of May, 1884, Charles Breckenridge, having returned to the state, made and executed to George and Henry Umphrey a quitclaim deed of said farm, which deed was duly acknowledged, and it was filed for record on the same day. George and Henry Umphrey took actual possession of the land when it was conveyed to them by Mrs. Breckenridge, and their possession continued uninterrupted until the fifteenth day of July, 1884, when they sold the same to the plaintiff herein by a written contract by which the plaintiff bound himself to pay for said land the sum of twenty-four hundred dollars, part of which consideration was agreed to be paid in the form of a mortgage upon the land, held by one Lombard, and the balance was to be paid directly to said Henry and George Umphrey in yearly payments. On the ninth day of December, 1887, George and Henry Umphrey conveyed the land by special warranty deed to the plaintiff. The exception in the warranty in the deed was, that the plaintiff assumed to pay the Lombard mortgage and interest. This deed was filed for record on the fourth day of February, 1888. The plaintiff did not take

actual possession of the land when he made his contract of purchase. It was then in possession of one Thompson, who was a tenant under George and Henry Umphrey. Thompson removed from the premises in March, 1885, when the plaintiff took possession, and continued to hold the same until the trial of this suit. These are the facts upon which the plaintiff bases his claim to the farm. The defendant claims the land by virtue of a quitclaim deed made, executed and delivered to him on the thirteenth day of June, 1887, by said Elizabeth Breckenridge and Charles Breckenridge for an expressed consideration of five hundred dollars. This quitclaim deed was filed for record on the twenty-seventh day of September, 1887.

The statute relating to the alienation of homesteads provides, that "a conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Appellee claims that the quitclaim deed executed to him by Elizabeth Breckenridge and her husband is the only valid conveyance or disposition they have made of the land, because it was their homestead, and they united in and signed the same joint instrument. It does not appear from the record before us, from whence Breckenridge and his wife came, nor whither they went after they surrendered possession of the land. The only evidence that the land was a homestead consists in the fact that they resided thereon for about ten months. No homestead plat was made and recorded as provided by law. Whether, after Breckenridge returned to the state, a homestead was acquired elsewhere does not appear. The plaintiff purchased the land from the Umphreys upon what appears to have been a full consideration, took possession from them, and held it for more than three years before the defendant claims to have acquired any interest therein, and his interest was acquired with full notice of the plaintiff's possession, which implied notice of all the rights acquired by his purchase from the Umphreys. If the defendant had made inquiry of the party in possession,

he would have ascertained that the plaintiff had paid in good faith, or contracted to pay, the sum of twenty-four hundred dollars for the land. He is charged with knowledge of all these facts, and yet he voluntarily took a quitclaim deed for the land for an expressed consideration of five hundred dollars, and insists that the plaintiff's claim of title is devoid of equity.

The homestead law is a wise provision for the benefit of the family. It ought not to be used as an aid to speculative ventures in the nature of attacks upon defective titles. In nearly every case in which this court has been called upon to determine homestead rights, the claim of homestead has been presented by the party entitled to enjoy the benefits of a home upon the land in controversy. It must be conceded that the occupancy of the land was sufficient to impress it with the homestead character, and that Elizabeth Breckenridge or her husband could have held forty acres of it as a homestead as against all claims but purchase money and previous debts contracted by her. But the facts show that they made no claim to hold the land as a homestead. The husband absconded before the deed was made by his wife to the Umphreys; and the conveyance by her, and her abandonment of the premises as a home, were parts of the same transaction. It was not a case of a subsequent abandonment, as in *Bruner v. Bateman*, 66 Iowa. 488. The conveyance and abandonment were simultaneous acts. That the husband had abandoned any claims of homestead is made manifest by the fact that upon his return he made no claim to the land as a homestead, but, on the contrary, made a quitclaim deed to the plaintiff's grantor.

The claim of the defendant appears to us to amount to this: That he can lawfully assert the homestead right in all of the eighty-acre farm, notwithstanding the fact that the only parties who could have asserted that right did not at any time make any claim of homestead to the forty acres which they might have held as a homestead. We have not thought it necessary to review the numerous decisions of this court in determining the

rights of parties under the section of the statute above cited. No case will be found where the facts are substantially the same as here presented. It appears from the evidence that by the contract of purchase the plaintiff bound himself to pay to George and Henry Umphrey the sum of five hundred dollars, June 1, 1885; five hundred dollars, June 1, 1886; and four hundred dollars, June 1, 1887. All of these payments were due before the defendant received the quitclaim deed under which he claims, and it is to be presumed that these installments were paid when they became due. The plaintiff knew that Breckenridge and wife occupied the land for part of the year 1883, but he had no knowledge that they claimed any homestead right therein until the defense was set up in this suit. We are satisfied that he was induced to believe, from the acts of Breckenridge and wife, that they made no claim to a homestead in the land, and that, if they could rightfully have made such claim, they ratified the invalid conveyance made by them.

In the case of *Lunt v. Neeley*, 67 Iowa, 97, the wife of the plaintiff held a contract or title bond for a conveyance of a homestead. The plaintiff left the state, and went to Colorado, with the purpose of establishing himself in business and removing his family to that state. He left his wife and children in possession of the homestead. After he left this state, his wife sold her interest in the property, and assigned the title bond to one Payne. The husband did not concur in and sign the assignment. Payne paid the balance of the purchase money, and then conveyed the property to one Warren. The wife of the plaintiff continued to occupy the homestead with her family for some two months after she sold it, when she yielded possession to Payne, and removed to Colorado, and joined her husband. Afterwards the plaintiff and family returned to this state, took up their residence in another dwelling-house near the homestead, and soon thereafter the wife of the plaintiff died, and plaintiff brought an action to quiet his title to the property, claiming that it

was his homestead. It was held that the assignment of the title bond by the wife alone was void; that when the right of homestead has once attached to the property it can be divested only by a joint conveyance, or by the abandonment of the property as a homestead by both the husband and wife. But it was further determined in that case that the plaintiff was not entitled to a decree. The court said: "It does not follow, however, that the subsequent purchasers of the property acquired no interest in it which they can assert against the plaintiffs. If C. R. Warren is in the position of an innocent purchaser, he is entitled to be protected against the claim urged by them, notwithstanding the invalidity of the sale and assignment by Mrs. Lunt. The bond and assignment to Payne were of record at the time he made the purchase from Mrs. Payne. The record of these instruments imparted no notice of a homestead right in favor of the Lunts in the property, and there was nothing in any of the conveyances constituting the chain of title which indicated the existence of such right, and they were not in possession, or in any manner asserting the right. He purchased from one who was in possession of the property, and who appeared by the record to have a perfect title to it, and he had no actual notice either of the claim now asserted by plaintiffs, nor of the fact on which it is based. He is clearly an innocent purchaser of the property, and as such should be protected." The rule announced in that case is decisive of this. Indeed, the equities of the plaintiff appear to us to be stronger and more persuasive than the claim of the purchaser in the cited case. Further elaboration appears to us to be unnecessary.

The decree of the district court is REVERSED.

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SARAH E. DUNN, Appellant, v. J. C. WOLF *et al.*, Appellees.

1. **Fraudulent Conveyance:** KNOWLEDGE OF GRANTEE. During the trial of an action against him upon an injunction bond a son conveyed to his mother certain real estate for about two thousand dollars less than its value. The litigation which was the moving cause of the sale was notorious, and the evidence in this action connected the mother with many badges of fraud which she failed to explain. *Held*, that a petition to enjoin the sale of said real estate on execution under a judgment recovered against the son on said injunction bond was properly denied.
2. ———: ACTION ASSAILING TITLE: PARTIES. In an action by the fraudulent grantee of real estate so conveyed to enjoin its sale on execution the grantor is not a necessary party.
3. **Pleading:** WAIVER. Defects in a pleading which are not assailed by motion or demurrer will be deemed waived.
4. **Practice:** INTRODUCTION OF ADDITIONAL EVIDENCE: DISMISSAL. After the final submission of a cause the trial court is without authority either to reopen the case for the introduction of additional evidence by either party, or to permit a dismissal of the cause without prejudice.

Appeal from Audubon District Court.—HON. H. E. DEEMER, Judge.

MONDAY, JANUARY 26, 1891.

ACTION to enjoin the sale of real estate on execution. There was a decree for defendants, from which the plaintiff appeals.

Benj. I. Salinger, for appellant.

Nash, Phelps & Green, for appellees.

GRANGER, J.—I. Arthur M. Ryan, Moses Crawford, William M. Dunn and A. M. Dunn were joint judgment debtors to the defendant Wolf. A. M. Dunn is the husband of the plaintiff, and has been since 1883. William M. Dunn

1. FRAUDULENT conveyance: knowledge of grantee.

is the son of A. M. Dunn, by a former wife. The judgment referred to was obtained November 18, 1885, and an execution issued thereon was by the defendant Herbert, as sheriff, levied on the lands in question on the seventeenth day of November, 1885, as the property of William M. Dunn. On the fifth day of November, 1885, William M. Dunn, by warranty deed, conveyed the land to the plaintiff, who brings this action to enjoin the sale. The defendants admit the execution of the deed to plaintiff, but aver that it was accepted by plaintiff to aid William M. Dunn and A. M. Dunn to defraud their creditors, and especially the defendant Wolf. From March, 1881, to some time in 1884, or later, there was litigation between William M. Dunn and defendant Wolf in regard to the ownership of real estate and improvements thereon, in the course of which proceedings an injunction issued at the instance of William M. Dunn. Ryan, Crawford and A. M. Dunn were, with William M. Dunn, obligors on the bond to obtain the injunction; and the judgment now sought to be enforced against the land was obtained on the injunction bond.

The cause in which Wolf's judgment was obtained was on trial on the fifth of November, 1885, and near the time when the taking of testimony was concluded, and the arguments to the jury commenced, A. M. Dunn left the court-room, went to the office of one Armstrong and procured the making of the deed in question; and, shortly thereafter, William M. Dunn went in and signed the deed, and also had prepared and signed a bill of sale of practically all his personal property to the plaintiff. The plaintiff was afterwards there, and accepted the instruments. A. M. and William M. Dunn were, before the trial was concluded, again in court; and, in answer to a question by counsel for William M. Dunn, "If it was fixed?" or words to that effect, one of them answered, "Yes; it's all right." It is not and could not well be contended by appellant but that, as to William M. Dunn, the transfer was fraudulent; but it is contended that, as to the plaintiff,

there is no sufficient showing to implicate her in the fraud, either because of knowledge of or participation in it. The district court found otherwise, and our examination of the record leads us to the same conclusion. The relationship of the parties, the notoriety of the pending litigation, and the particular time of the transfer, the manner of its accomplishment, the difference between the price paid and its actual value, being upwards of two thousand dollars, the purchase of the property without an examination of it, and the failure of the plaintiff in her own behalf to explain the many badges of fraud against her apparent on the trial, leave little room to doubt the correctness of our conclusion. These general conclusions are aided materially by the evidence in detail, which we do not present.

II. It is urged that the decree cannot be sustained, because William M. Dunn is not made a party to this proceeding. The effect of the decree is to subject the land to the payment of his debt, on the theory that he is a fraudulent grantor. The point is clearly controlled by the holding in *Potter v. Phillips*, 44 Iowa, 353; and see, to the same effect, *Coffey v. Norwood*, 3 South. Rep. (Ala.) 8; Bump, Fraud. Conv. [3 Ed.] sec. 458; Wait, Fraud. Conv., sec. 136; *Buffington v. Harvey*, 95 U. S. 99; *Walker v. Powers*, 104 U. S. 245.

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III. It is said that it is not alleged nor proven that the judgment debtors of the defendant Wolf are insolvent. We need not determine the necessity for such allegation and proof, because defendants' answer is in the nature of a cross-petition asking affirmative relief, and the defect as to allegations is apparent on its face. It was not assailed by demurrer, and under repeated decisions of this court, and Code, section 2650, the defect is waived. The proofs need only conform to the allegations of the petitions. *Mann v. Taylor*, 78 Iowa, 355. This holding disposes of much said in argument bearing on the admission of evidence and the sufficiency of the proofs to show insolvency.

3. PLEADING: waiver.

IV. After the cause had been finally submitted, the plaintiff filed a motion for leave to introduce further testimony, or be allowed to dismiss the cause without prejudice to a future action, and supported the motion by affidavit showing why the testimony was not offered on the trial, which the court overruled, and the court's action in that respect is made a ground of complaint. It will be observed that the motion asks, *first*, that the plaintiff be allowed to introduce additional evidence, and, *second*, that being refused, that she be allowed to dismiss the cause without prejudice. As to the right to introduce additional evidence, Code, section 2799, provides that, at any time before the cause is finally submitted, either party may be allowed to do so. In *Sickles v. Bank*, *ante*, p. 408, it was held that when the final submission takes place may be left to the discretion of the district court, but that such right does not exist after final submission. In this case the record states that the motion was made "after said cause had been finally heard and submitted;" hence the district court had no authority to grant the motion. As to the second request in the motion, we look to Code, section 2844. It is there provided that an "Action may be dismissed, and such dismissal should be without prejudice to a future action: *First*, by the plaintiff before the final submission of the case to the jury, or to the court, when the trial is by the court." The same considerations must control on this branch of the motion. The cause had been finally submitted, and the court was without discretion to grant the request. The judgment is AFFIRMED.

4. PRACTICE: introduction of additional evidence: dismissal.

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C. SAX & BRO., Appellees, v. A. J. DAVIS, Appellant.

1. **Sale**: AGENCY: EVIDENCE. It being sought to charge the defendant herein with the value of goods sold and delivered to another, under the belief that such person was defendant's son, and that the goods were purchased by him as defendant's agent, *held*, that it was competent for the defendant to testify, that the person to whom the sale was made was not his son, and that he had not recognized him as such.

2. ——: ——: ——. The defendant having testified that one N. had the control and management of his farm, *held*, that it was competent for him to testify that N. had no authority to purchase goods on his credit, nor to authorize others to do so.

3. ——: EVIDENCE. In an action to recover for goods sold and delivered to one at a place named, testimony by the defendant that he never purchased any goods from the plaintiffs at the place named or elsewhere is competent.

4. **Agency**: DECLARATIONS OF AGENT. The fact of agency cannot be proven by the admissions or declarations of the person claimed to be an agent.

Appeal from Van Buren District Court.—HON. DELL STUART, Judge.

TUESDAY, JANUARY 27, 1891.

ACTION upon an account for goods sold and delivered. There was a trial by jury, and a verdict and judgment for the plaintiffs. The defendant appeals.

S. S. Carruthers, for appellant.

Sloan, Work & Brown, for appellees.

ROTHROCK, J.—I. This cause was appealed to this court by the defendant at a former term, and the judgment was reversed. 71 Iowa, 406. The second trial was upon the same issue, and resulted the same as the first. It will be observed from

1. SALE: agency: evidence.

the statement of the case in the opinion on the former appeal that, in order to sustain the action, it was necessary for the plaintiffs to prove that T. J. Davis was authorized by the defendant to purchase the goods on the defendant's credit. It is not claimed that the goods were charged to the defendant when they were purchased. On the contrary, it is conceded that in the account, as it appears on the books of the plaintiffs, the goods were not charged to the defendant, but they were charged to T. J. Davis. There is no evidence of any express promise by the defendant to pay for the goods, and no direct evidence that he authorized T. J. Davis to purchase them on his credit. The verdict of the jury, so far as it is sustained by evidence, is founded upon facts and circumstances which it is claimed establish the fact that T. J. Davis was the agent of the defendant, and that by virtue of such agency he purchased the goods for the defendant.

It appears that there was a rumor in the neighborhood of the farm of the defendant to the effect that T. J. Davis was a son of the defendant, and one of the plaintiffs was permitted to testify that the defendant was supposed to be the father of T. J. Davis; but this was not permitted to go to the jury as tending to establish the claimed agency. The evidence was admitted to go to the jury as preliminary. It is claimed that this was error. It may be that, if this were the extent of the court's ruling upon the relationship of the parties, we might say that the ruling was without prejudice. But the defendant's deposition was offered in evidence in his behalf, and he was asked on cross-examination this question: "You are the father of T. J. Davis, are you not?" The answer was: "No." He was then asked: "You have recognized him as your son, have you not?" The answer was: "No." These answers were excluded, on the objection of the plaintiff, because they were incompetent. It is quite apparent that the rulings of the court should be consistent with each other. We think that if T. J. Davis was the son of the defendant,

and made the purchases while engaged in the management of his father's farm, it would be a circumstance proper to be shown, not by mere rumor, but by competent evidence, and it was surely competent for the defendant to show that no such relationship existed.

II. The defendant was further interrogated in said deposition as follows: "What authority, if any, did Nelson have to purchase goods of anyone on your credit, or to authorize anyone else to?" The answer was as follows: "None." This was objected to by plaintiffs as incompetent, and the objection was sustained. This was prejudicial error. The defendant claimed all through his evidence that one Nelson had the control and management of his farm, and it was surely competent for him to show that Nelson had no authority to purchase goods on defendant's credit, nor to authorize any other person to do so.

2. THE same.

III. It further appears in the deposition that the defendant was asked this question: "State whether you ever purchased any goods of the plaintiffs at Ottumwa, Iowa, or elsewhere." The question was objected to by plaintiffs as calling for a conclusion, not answering any testimony, and incompetent. The objection was sustained. The answer to this interrogatory was to the effect that defendant had made no such purchase, and that he at no time authorized T. J. Davis to purchase goods of plaintiffs on defendant's credit. If the answer is true, the defendant was not liable to the plaintiffs for the goods. We think the ruling in sustaining the objection to the question was erroneous. It is true the question is somewhat comprehensive; but it did not necessarily call for a conclusion of the witness, and the answer is not in the nature of a conclusion. If there is any semblance of ground of objection to the evidence it should have been directed to the answer to the question as not responsive, rather than to the question. But we think that even that objection would not have been good.

3. —: evidence.

IV. In view of a new trial, it is proper to say that the letter, "Exhibit E," on page 8 of the abstract, is

4. AGENCY: declarations of agent.

not competent evidence in the case for any purpose. It tends to show the claimed agency by the declaration of the agent, and we need not cite authority in support of the proposition that agency cannot be established by the admissions or declarations of the person claimed to be an agent. There is some doubt, however, whether the introduction of this letter as evidence was properly objected to by the defendant.

V. We have examined the other alleged errors in the rulings, or the admission and exclusion of evidence, and are of opinion that the objections to such rulings are without merit. The instructions to the jury, and the refusal to give the instructions asked, ought not to be the subject of complaint. The trial, in these respects, appears to us to have been conducted without any valid objection.

For the errors above mentioned the judgment of the district court is REVERSED.

CHARLES STROFF, Appellant, v. SWAFFORD BROS. *et al.*, Appellees.

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1. **Debtor and Creditor**: CONVEYANCE: FRAUD: NOTICE. A conveyance of real estate made by an insolvent firm, pending litigation, to the father-in-law of one of the partners, to secure him for advances of money made to the firm to about the market value of the land, over and above the amount of incumbrances thereon, and which is received in good faith for the purpose of security only, *held*, not invalid as against other members of the firm, even though the grantee had knowledge of a fraudulent purpose on the part of the firm at the time the conveyance was accepted.

2. ———: ———: RESERVATION IN FAVOR OF DEBTOR. A secret agreement between the debtor and creditor at the time of the delivery of such conveyance, that the debtor shall remain upon the land for one year, for the purpose of taking care of stock kept thereon, and belonging to the creditor, and that for such privilege the debtor should pay the taxes against the land for such year, *held*, not to constitute such a secret reservation in favor of the debtor as to render the conveyance fraudulent.

Appeal from Linn District Court.—HON. JAMES D. GIFFEN, Judge.

TUESDAY, JANUARY 27, 1891.

C. G. AND L. G. SWAFFORD were partners and composed the firm known as Swafford Bros. Prior to March 17, 1888, they owned two hundred and sixty-five acres of land, which is a subject of controversy in this case. On that day they conveyed the land by warranty deed to defendant, L. B. Strang, who is, and was then, father-in-law to L. G. Swafford. The consideration for the land, as claimed by Strang, is twenty-one hundred and ten dollars, advanced by him to Swafford Bros. from time to time, with a liability for the payment of incumbrances on the land of thirty-eight hundred dollars. On the same day, for a consideration of seven hundred and seventy-five dollars, C. G. and L. G. Swafford made to defendant Strang a chattel mortgage on certain personal property then on the farm before conveyed, the said farm and personal property being all the property owned by said Swaffords not exempt from execution. At the time of these transfers the plaintiff was, and still is, a judgment creditor of Swafford Bros., and this action is to set aside these transfers of property as in fraud of their rights. The district court denied the prayer of the petition, and from its judgment the plaintiff appeals.

Wm. G. Clark and *James A. Reed*, for appellants.

Milton Remley and *H. B. Heberling*, for appellee Strang.

GRANGER, J.—The appellant follows his statement of facts, preceding his argument, as follows: "On the foregoing facts, with other circumstances to be pointed out hereafter, appellant asks the court to declare the transfer of the real and personal property void on four

grounds: *First.* Because the transaction is unconscionable as against creditors,—a palpable and monstrous fraud. *Second.* It is fraud *per se* for Strang to appropriate the property of Swafford Bros., or of C. G. Swafford, to pay the personal debt of L. G. Swafford. *Third.* Because of a secret reservation of a year's rental of farm. *Fourth.* Because of Strang's purchase of the personal property, with full knowledge of the Swaffords' fraudulent design." The consideration of the questions thus presented will be a very acceptable way of disposing of the case.

I. The first proposition leads us to consider the circumstances under which the transfers were made.

1. DEBTOR and creditor: conveyance: fraud: notice.

In the latter part of 1887, there were pending against Swafford Bros. three separate suits, in which judgments have been obtained, two of which constitute liens on the land in question to the amount of twenty-eight hundred dollars, and is a part of the incumbrance referred to in the statement of facts. The other was the suit of plaintiff, in which the judgment was obtained now sought to be enforced against the land. At the time of the transfer these suits had not been finally determined. The fact of the pendency of the suits was known to defendant Strang before and at the time of the transfers, and he was fully aware that the Swaffords were being pressed by their creditors, and were, in fact, insolvent. These are the prominent facts upon which appellant relies to establish the fact of the fraud. We do not understand that it is seriously questioned but that Strang loaned to L. G. Swafford or to Swafford Bros. from October, 1885, to March, 1886, twenty-one hundred and ten dollars, nor that he actually furnished seven hundred and seventy-five dollars, for which the chattel mortgage was given as security.

A disputed question in the case is whether the twenty-one hundred and ten dollars was loaned to L. G. Swafford or to the firm, and it will be well to first settle that question of fact, to more readily know the

legal questions to be met. Appellant insists upon the fact that it was an individual loan to L. G. Swafford, but we think otherwise. Nothing is clearer than that L. G. Swafford, in obtaining the money, intended it for the firm, and not, as is thought, to meet his obligation to the firm, but because the firm needed money. There is no testimony to show that he was required to furnish such money. It does appear that both members of the firm procured from their friends money for the use of the firm, but nothing to show that it was because of an individual obligation to do so. L. G. Swafford, who obtained it, says it was for the firm, and was used by the firm. Such is the general purport of the evidence with reference to that fact. Some statements, as that the money was obtained or loaned to L. G. Swafford, are in the record, but have reference more particularly to the fact that he was the one who asked for and received it. We think the money was loaned to the firm.

With the fact established that Strang was a *bona fide* creditor of the firm, very much of the difficulty on this point of the case is removed. Of course, Strang could be a creditor, and yet act with a fraudulent intent in accepting the conveyances, but, in such a case, it is far more difficult to show the fact. From the evidence it appears that Mr. Strang is quite a wealthy and prosperous farmer. His testimony impresses us with the belief that he is a man of remarkable candor and fairness, not deviating from the truth when against his interest, as in many cases he might have done to his apparent advantage. From the evidence we find about this state of facts at the time of the transfers: Strang was a creditor of the firm. He had loaned the twenty-one hundred and ten dollars, without a thought that it was unsafe. In the fall of 1887, and later, to the time of the transfer, he knew the firm was financially embarrassed, and in failing circumstances. He was offered the farm, with what then appeared to be an incumbrance of thirty-eight hundred dollars in payment. He was in the position of accepting

that, or the chances of a partial or entire loss. His acts, if in good faith, were in accord with business prudence. We think the value of the land was not largely, if at all, in excess of the debt and incumbrance to be paid. The evidence ranges from twenty to thirty dollars per acre. The cost to Strang is nearly twenty-three dollars per acre, and is likely a fair market price. Importance is attached to the fact that some of the liens might have been removed by a reversal of the judgments, and there seems to have been no provision made at the time of the transfer as to what should be done in such a case. The evidence does not show an expressed understanding in that respect. There is some evidence as to the opinions of witnesses in that event, but it is of no moment. The liens existed, and for the purpose of the case continue to exist. There is no evidence of an agreement that Strang should not pay the full price, if for any reason the liens were removed. The case is argued, in its legal aspect, much as if it were a case in which Strang, with knowledge that the Swaffords were disposing of their property to defraud their creditors, purchased the farm, and parted with his money with such knowledge. Strang was a creditor, and in such a case had a right in good faith to secure payment, even if there was knowledge of a fraudulent purpose on the part of the Swaffords. *Johnson v. McGrew*, 11 Iowa, 151; *Carson v. Byers*, 67 Iowa, 606; *Chase v. Walters*, 28 Iowa, 460; *Aultman v. Heiney*, 59 Iowa, 654; *Collier v. French*, 64 Iowa, 577; *Aulman v. Aulman*, 71 Iowa, 124; *Manuf. Co. v. Mastin*, 75 Iowa, 112; *Stewart v. Bank*, 76 Iowa, 571; *Lead Co. v. Haas*, 73 Iowa, 399. We reach quite a satisfactory conclusion that Strang did not, in legal contemplation, participate in any fraud to defeat the creditors of Swafford Bros.

II. The second proposition is disposed of by our finding that the debt was that of the firm, and not of L. G. Swafford personally, except as a member of the firm.

III. It is a part of the contract for the purchase of the farm that C. G. Swafford, who was then living on

2. —: —: reservation in favor of debtor.

it, should remain during that year, and it is urged that, because of such agreement, the transaction is void as to creditors under the rule announced in *Macomber v. Peck*, 39 Iowa, 351, and in *Dean v. Skinner*, 42 Iowa, 418, and other cases. The rule there stated is that, "where land is conveyed with a secret reservation, that the vendor shall have the right to use and enjoy it for a time without the payment of rent, such use and enjoyment constituting a part of the consideration the conveyance is fraudulent in law, although based on a valuable consideration." To our minds the facts of this case do not bring it within such rule. We have found that there was no fraud in fact. Before the rule as to fraud in law will be applied, the facts must bring the case clearly within it. In regard to the occupancy of the farm, Mr. Strang says in his cross-examination: "It was in the contract for the purchase of the farm that I was to let them occupy the farm for the ensuing year, they taking care of the stock. Yes, sir; that was in the bargain. He was to remain there; didn't want to change. Yes, sir; he was to pay the taxes for the privilege." In his direct examination he says: "C. G. was not paying any rent during the year 1888. I bought the cattle in June, and the cattle were to run there during the fall. I got the privilege of the cattle running there until fall, and he took care of them for me." This purchase of the cattle, as we understand, was an absolute purchase of those included in the mortgage given March 17, before. Mr. Strang in his testimony further says: "The understanding was that C. G. was to stay there this year. There was no written agreement. I bought the cattle the last of June. No; I didn't buy. Yes, I did. I bought everything that was covered by that chattel mortgage. At least, I agreed on the prices the cattle should be. I received no bill of sale. The cattle was to remain on the farm, and they was to take care of them. I did not pay them anything. He was living on the place then." It is quite clear to us that the occupancy of the farm by C. G. Swafford

constituted no part of the consideration therefor. At the time of the purchase of the farm there was a transfer to Strang of the cattle, which he desired to remain on the farm, and, as he resided elsewhere, they must be cared for by others, and it was agreed that C. G. Swafford might remain and care for the cattle, and pay the taxes for the privilege. Such is a fair conclusion from the testimony. It is not then a case within the rule of the cases cited. There was no secret reservation of rent by which creditors could be defrauded.

IV. It is lastly urged that the sale is void "because of Strang's purchase of the personal property, with full knowledge of the Swaffords' fraudulent design." We need say no more than that the proofs do not satisfy us of the purchase being under such a state of facts. It is true that he made the purchase with the knowledge of their litigation, and we may say insolvency, but it does not follow that they made the sale for a fraudulent purpose, or if they did that he knew it. This seems to have been the view of the district court, and its judgment is AFIRFMED.

In the Matter of the Estate of JOHN H. RAWLINGS, Deceased.

1. **Estates of Decedents:** SALES OF REAL ESTATE: DOWER. The deceased being the owner of a farm, including the homestead, and also a small tract of land of about thirty-four acres, a portion of the whole of which was needed to pay the indebtedness of the estate, the court ordered that both tracts of land be sold, and that the whole of the proceeds of the thirty-four-acre tract be applied upon the indebtedness, and that so much of the proceeds of the home farm as might be necessary to satisfy the indebtedness be appropriated for that purpose, and that one-third of any balance remaining be paid to the widow upon her dower. *Held*, that the decree was not erroneous because the widow's dower was not limited to her homestead right in forty acres of the home farm.

2. **Will**: CONSTRUCTION. A clause in a will read: "I want all stock to stay on all my farms, and, as fast as can be sold to an advantage, to be sold, and be paid on my debts." It appeared that the whole of the personal estate of the deceased was valued at less than half the amount of the indebtedness of the estate. *Held*, that the provision should be construed as directing a sale of so much of both his real and personal property as might be necessary to pay the debts of the testator, with a devise of the remainder.

3. ——: DOWER: ELECTION OF WIDOW: EFFECT. Where a testator devises a life-estate to his widow, with a remainder to residuary legatees, and gives directions with respect to the preservation of the estate during the lifetime of the widow, and the widow elects to take her dower interest in lieu of the provision for her made in the will, the will will not be allowed to fail because through the election of the widow some of its provisions cannot be performed, and the residuary legatees will be entitled to so much of the estate as remains after satisfaction of the widow's dower.

Appeal from Davis District Court.—HON. DELL STUART, Judge.

TUESDAY, JANUARY 27, 1891.

JAMES E. RUSSELL, executor of John H. Rawlings, deceased, filed his petition asking for an order of sale of the lands of the testator in order to realize funds out of which to pay his indebtedness. Zeralda Rawlings, the widow of the testator, who refused to take under the will, answered the petition, and asks that she be allowed her dower interest in the lands, which shall be secured to her by the payment of one-third of the sum realized by a sale of the lands. Anna E. Cary, a daughter of the testator, resists the claim of plaintiff to dower. Other defendants, who answer, ask that their interests may be protected. The decree of the district court ordered the sale of the lands, and directed that one-third of the proceeds, after the payment of liens, be paid to plaintiff, in lieu of her dower in the lands. From this decree Anna E. Cary appeals.

L. C. Mechem, for appellant.

Payne & Eichelberger, for appellee.

BECK, C. J.—I. The estate of the testator was largely indebted. One claim, held by H. H. Trimble, was secured by mortgage on certain lands. By the decree of the court below, the proceeds of the sale of the lands are to be appropriated to the payment of the mortgage, and one-third of any balance is to be paid to plaintiff upon her dower interest. No objection is made by any of the parties to this provision of the decree. It, therefore, demands no attention.

II. The testator executed to the Security Loan & Trust Company two mortgages upon two other tracts of land, aggregating in quantity two hundred and thirty-four acres. One tract of two hundred acres was the farm upon which testator and his widow lived for many years. The other tract, thirty-four acres, was not regarded as a part of the farm, not being adjacent to any part thereof. By the decree of the court below, the proceeds of the sale of the thirty-four acres is to be applied on the mortgage, with two-thirds of the proceeds of the other land constituting the farm, if such amount be necessary to pay the debt; but the whole proceeds, if it be necessary to use them to pay the mortgage, shall be so applied. The effect of the decree being to confirm the lien of the mortgage against all the land, but requiring one-third of any balance remaining from the proceeds of the farm to be applied, to the extent of one-third thereof, upon the widow's claim for dower. It is insisted that this provision of the decree is erroneous, for the reason that it does not hold that the proceeds of the sale of the land be applied to the payment of the mortgage debt, without regard to the widow's dower interest. It is insisted that the widow held a homestead right in forty acres only, and that her right to the protection awarded her by the decree should be limited to her homestead. But, in our opinion, the decree does not depend for support upon the widow's dower right. The decree, in effect, directs that the mortgage shall be paid, even though it requires all the proceeds of the sale of the lands; but, if

1. ESTATES of decedents: sales of real estate: dower.

less will pay the mortgage, then the widow takes one-third of the balance remaining. All of the proceeds of the thirty-four acres are applied upon the mortgage. The court had the authority to so decree, in order to rightly set apart to the widow the portion of the proceeds of the land to which she is entitled on account of her dower interest. That interest the district court may determine and set apart. We think that duty was righty discharged by the decree. We are unable to discover in what regard the defendant who appeals is prejudiced. The decree gives to the widow no more than she is entitled to. If the decree had given her less, it would have been erroneous.

III. Certain lands of the estate were unincumbered. The decree directs that they be sold, and one-third of the proceeds first applied to the widow's claim for dower. No objection is made to this provision of the decree.

IV. The will is in the following language:

"In the name of God, amen. I, John H. Rawlings, of the town of West Grove, in Davis county, and state of Iowa, of the age of seventy-three years, and being of sound mind and memory, do make, publish and declare this my last will and testament in manner following property, that is to say: *First.* I give and bequeath to John H. F. Kery a lot of four (4) acres on the north corner of the southwest quarter of section twelve (12), in consideration the timber on ten acres of ground on section fourteen (14). *Second.* I want all stock to stay on all my farms, and, as fast as can be sold to an advantage, to be sold, and be paid on my debts. When my debts is paid, the remainder to my wife, Zeralda Rawlings, her lifetime, and at her death it shall be equally divided between Anna Elizabeth Kery and James R. Kery. In witness whereof, I have hereunto set my hand and seal this eleventh day of October, 1887.

"JOHN H. RAWLINGS.

"Addition. I want the stock kept in by James R. Cary, and he to cultivate the home farm; Zeralda, my wife, and he and his family to constitute a family, and

2. WILL: construction.

have their support from the gross proceeds of effects, and for his services he receive one-half the net proceeds after taxes and all expenses; the present stock, the stock that will come to market in the next two years, is not in this division, and the brown colt to remain on the farm as a breeder. I also make Wm. Russell my executor. In witness whereof I hereunto set my hand and seal this thirteenth day of October, 1887.

"JOHN H. RAWLINGS."

The first item of the will is not a subject of dispute, and need not be considered. We are to determine what property is disposed of by the second item. The second item is in this language: "I want all stock to stay on all my farms, and, as fast as can be sold to an advantage, to be sold, and be paid on my debts. When my debts is paid, the remainder to my wife, Zeralda Rawlings, her lifetime, and at her death it shall be equally divided between Ann Elizabeth Kery and James R. Kery." It is evident that this provision devises and bequeaths whatever property it authorizes to be sold. A relative pronoun, or its equivalent, before the words "can be sold" would have made the meaning plain. We are authorized to supply such words in order to determine the true meaning of the sentence. Such pronoun or words should refer to and indicate the word "farms," as one of the subjects of the verbs "can be sold" and "to be sold." The word "farms," as well as "stock," doubtless, was intended by the testator to be the subjects of the sentence, though probably that may not be inferred from the words of the sentence alone. But that he intended to direct the sale of the farms for the payment of his debts cannot be doubted, in view of the fact that his debts amounted to seventy-five hundred dollars, and his whole personal estate is estimated at thirty-five hundred dollars. What was the value of the personal estate, other than the stock, does not appear, but it is to be inferred that it did not equal the sum named, for it appears that some other personal property belonged to the estate. But, if it be assumed

that the stock was of the value of thirty-five hundred dollars, it is plain that the testator did not direct the payment of seventy-five hundred dollars of debts out of that property alone. He intends that the stock and lands be sold for the payment of his debts, and whatever of the property or proceeds thereof remained after the payment of his debts should go to his wife for life, and whatever remained at her death should go to the beneficiaries named in the will. It is plain to our minds that the second item of the will disposes of the lands of the estate not disposed of in the first item. We reach the conclusion that the district court rightly held that the defendants, Ann Elizabeth Cary and James R. Cary, are the residuary legatees, entitled to the proceeds of the property not otherwise disposed of in the will after payment of debts, and the proceeds to be paid the widow on account of her dower interest.

V. The widow, Zeralda, refuses to take under the will. Of course, this does not invalidate the will as to the devises and bequests to others. The provisions of the second item for keeping property and its sale need not be the ground of contention, for it clearly appears, both by this item and the "addition," that they, in this regard, cannot be obeyed after the wife refuses to take under the will. The property was to be kept for the use of the wife under the will. As she refuses to take under the will, that part of the items relating to the keeping of the property cannot be obeyed, and must be left out of view. The same is true as to the widow's life-estate. The will provided that Ann Elizabeth Kery (Cary) and James R. Kery (Cary) shall take the property after the widow's life-estate ends. But the widow refuses to take a life-estate, and takes dower. It clearly appears that the testator intended that the devisees just named should take the property after its enjoyment by the widow ceased, and after her interest therein was terminated. He did not intend that the benefactions to these devisees should be under the control of his wife, or should be

8. —: dower: election of widow: effect.

defeated by her. Under the exercise of her option, she refuses to take a life-estate, but takes the estate the law gives her. It clearly appears that the testator intended the devisees to take of the property whatever remained after the widow's right thereto terminated. The law will effectuate the intentions of the testator, if possible, and will secure to the legatees as nearly the benefits intended by the provisions of the will in their favor as can be done. 1 Redf. Wills. [3 Ed.] p. 429, note.

These considerations lead us to the conclusion that the decree of the district court ought to be AFFIRMED.

SUPPLEMENT.

[The following opinions were rendered at the May, 1890, term of the court, but were not published with others of that term because of the filing of petitions for rehearing, which were ruled upon at the October, 1890, term.—REPORTER.]

GEO. W. RADFORD, Assignee, v. A. B. THORNELL, Judge.

1. **Liquor Nuisance:** ABATEMENT: NON-RESIDENTS: ORIGINAL NOTICE: SERVICE. A non-resident of this state having title to real estate within the state as assignee in bankruptcy may, under Code, section 2618, subdivision 6, be served with original notice of an action commenced against him in this state under Code, section 1543.

2. ——: ——: ——: ASSIGNEES IN BANKRUPTCY: JURISDICTION. The courts of this state have jurisdiction of actions commenced under Code, section 1543, for the abatement of a nuisance, which is maintained upon real estate held by one as assignee in bankruptcy under appointment of a federal court in a foreign state, and such property is subject to the judgments of the courts in such cases to the same extent as other property within the state.

Certiorari to the Pottawattamie District Court.

THURSDAY, MAY 22, 1890.

THE plaintiff is the assignee in bankruptcy of Simeon and Frank Folsom, and holds his appointment from the United States district court, for the eastern district of Michigan, the assignee being a resident of the district in which he is appointed. Lot number 404, on Broadway, in the city of Council Bluffs, in the county of

Pottawattamie, is a part of the bankrupt estate, and the title thereof is in the plaintiff, as assignee. In August, 1888, one A. Overton, being a citizen of said county, instituted proceedings under the law for the suppression of intemperance, alleging that intoxicating liquors were being kept on said lot in violation of the law, and asking that the place be adjudged a nuisance, and that it be abated. In this proceeding Radford, as assignee, is made a defendant, and, under the usual averment that he was a non-resident of the state, service was had by publication. Default was made, and judgment entered in substantial accord with the prayer of the petition. The plaintiff institutes this proceeding to test the legality of the action of the district court.

Sapp & Pusey, for plaintiff.

Stone & Sims, for defendant.

GRANGER, J.—I. It is urged that the district court was without jurisdiction, because of no service being made as contemplated by law. The law provides under what circumstances a service by publication may be had, and we must look to Code, section 2618. The section specifies eight cases wherein service may be made by publication, and we think, if such service may be had in this case, it must be by virtue of subdivision 6, of the section, in these words:

1. LIQUOR NUISANCE: ABATEMENT: NON-RESIDENTS: ORIGINAL NOTICE: SERVICE.

"*Sixth.* In actions which relate to, or the subject of which is real or personal property in this state, when any defendant has, or claims, a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of this state or a foreign corporation."

Plaintiff's quotation of the subdivision is from Miller's Annotated Code of 1888, and the words, "or claims a lien or interests," are made to read "or claims a lien *of* interest. In the Code, as published in 1873, and

also, in McClain's Code of 1888, the word is *or*, and that is evidently the correct language. The clause has hardly a practical meaning if the word *of* is used. The correction detracts much from the force of plaintiff's argument on this branch of the case, as he quotes the clause, and says: "He is not a lienholder in any sense. The law makes him the holder of the title in fee, by virtue of his office." The suit is against him in his official capacity, and as such, if he holds the fee, he has an interest. Looking to the petition, we see that the action relates entirely to real estate, and to the lot in question. The action is brought to have the place adjudged a nuisance, and the nuisance abated. Inasmuch as the defendant is a non-resident, and the service is by publication, the judgment cannot be personal, and the object of the service is to obtain jurisdiction as to the place or property sought to be condemned. In this respect it is not unlike our *ad quod damnum* proceedings. Code, section 1543, provides that the building or erection of whatever kind, or the ground itself, in or upon which the unlawful sale of liquor is carried on, and the furniture, fixtures, vessels, etc., are a nuisance, —not the person who keeps it,—and the action relates directly to the property, and we think the case is clearly within the provisions of the section.

II. It is next urged that the district court was without jurisdiction because the property was in the custody and control of the federal court by virtue of the bankrupt proceedings, and very many authorities are cited to show its exclusive jurisdiction. There appears to be an old bankrupt proceeding, which is yet unsettled, and the assignee not yet discharged, and the claim is, that the jurisdiction of the federal court, for the purpose of the bankrupt proceedings, operates to exclude the jurisdiction of the district court of this state. That such is the general rule, could not be questioned, and the point urged by the defendant in support of the jurisdiction of the state court is, that its exercise is justified by virtue of the inherent power of

2. —: —: assignees in bankruptcy: jurisdiction.

the state to enforce its police regulations, to protect it citizens against the use of property in such a way as to impair the morals, health or happiness of the people. It is true that the statutes of the United States vest the federal courts with exclusive jurisdiction "of all matters and proceedings in bankruptcy," and the federal laws make quite extended specifications of the particulars of the jurisdiction, but among its specifications there are none seeming to indicate a purpose to control property to the exclusion of the state courts in any particular wherein its use under the laws of the state renders it subject to regulation or control for the health of the people or the preservation of good order. Indeed, it would seem that the assumption of such jurisdiction would be unwarranted. These proceedings in the state courts do not come within the scope or meaning of the law giving jurisdiction "of all matters and proceedings in bankruptcy." While they may deal with property belonging to a bankrupt estate, they are not designed to interfere with proceedings in bankruptcy, but for an independent purpose, and only to preserve the property against unlawful use. The detriment that might result from having to look to the protection of a federal court in Michigan, or any other foreign state, against the unlawful use of such property, can better be imagined than expressed; nor is it of the genius of our form of government that communities are to thus seek protection against criminal conduct, or the baleful consequences of maintaining a public nuisance in their midst. It is easy to imagine the existence of a nuisance more immediate and fatal to the health or peace of a community, and it will certainly be a wide departure from any known rule of procedure, if the operations of a bankrupt proceeding are to suspend the functions of the state courts in the application of the law for the suppression of such a nuisance. There is nothing in the spirit or policy of the bankrupt law evincing a purpose to exempt the property of a bankrupt estate from the operation of the state laws for governmental purposes in common with other property of the

state, either by the imposition of burdens or the restraints of use; nor does the law evince a purpose to divest the state courts of authority to give force and effect to the law for such purposes.

The effect of the judgment in the injunction proceeding was not to remove the property from the jurisdiction or control of the federal court, or to in any manner interfere with the operations of such court in the settlement of the bankrupt estate. It merely determined that the assignee should not use the property for an unlawful purpose, and assumed a control only to the extent of preventing such use. The judgment for costs, and the lien for its security, are the result of the assignee's misconduct in permitting the unlawful use of the property, and is a method prescribed by the law as a means to its enforcement. In this respect the property in question is on a common level with all other property of the state. If it is subject to the same restraints against unlawful use as other property, must it not be subject to the same consequences and burdens as other property under like conditions? It cannot be that it is the policy of the bankrupt law to interfere with the laws of a state for the regulation or control of property as against unlawful use, nor with the courts of the state in the application of such laws. If, in the application of the law, the property of a bankrupt estate becomes burdened with assessments because of its misuse, they should be treated by the federal courts as other legal assessments are. We do not follow plaintiff through the long line of authorities cited, because there can be no question of their force under the facts as they appear, nor are they broader than the language of the general statutes of the United States, but they are all based on facts so different from the case before us, that we think a different rule applies. The recent adoption of the law of this state under which the injunction proceeding was instituted makes the case, to some extent, unlike any other as to its facts; yet it is not outside the spirit of many decisions bearing on the authority of a state for the enforcement of police regulations. *Martin*

v. Blatner, 68 Iowa, 287; *Railroad v. Husen*, 5 Otto, 465; *License Cases*, 5 How. 504; *Munn v. Illinois*, 4 Otto, 113. As bearing on the exclusive authority of the federal courts in matters that may affect property of a bankrupt estate, see *Clark v. Ewing*, 3 Fed. Rep. 83, where the statute giving to federal courts jurisdiction "of all matters and proceedings in bankruptcy" is to some extent construed, and other authorities are cited. The rule is much more liberal than the contention of plaintiff in this case.

These two points fully establish the jurisdiction of the district court, and is a determination of the case in this proceeding. If the court had jurisdiction, other questions, such as the extent of the attorney's fee, and the decree without evidence, can be reviewed only on an appeal. The writ of *certiorari* is DISMISSED.

W. S. WILLARD, Appellee, v. MARIA WRIGHT *et al.*, Appellants.

Will: VALIDITY: LIMITATION OF ACTIONS. In an action to quiet the title to certain real estate, the defendants filed a cross-petition, alleging that the will under which the plaintiff claimed was invalid for reasons stated, and that the probate thereof was obtained by the plaintiff through fraud. The action was commenced more than six years after the probate of the will. *Held*, that actions assailing the validity of wills must be brought within five years after their admission to probate, and that the defendants' cross-petition should, therefore, be dismissed. [ROBINSON, J., *dissenting.*]

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, MAY 29, 1890.

ACTION to quiet the title to lands. There was a decree granting the relief prayed for in plaintiff's petition, from which defendants appeal.

J. M. Parsons, for appellants.

E. C. Roach and *Van Wagenen & McMillan*, for appellee.

BECK, J.—I. The petition alleges that the plaintiff is the owner in fee simple of certain lands, and that defendant makes some claim thereto. The relief asked is that the title of the lands be quieted in plaintiff. The defendants in a cross-petition allege that they hold the lands as heirs of S. B. Willard, who died seized thereof; that before his death he made a will devising the property to plaintiff; that it was signed by but one witness, and the testator at the time of the signing of the will was not possessed of his reason, and that after the death of the testator, the plaintiff fraudulently obtained possession of the will, and fraudulently procured it to be admitted to probate, and caused himself to be appointed as administrator; that he made a final report, and caused a temporary executor to be appointed, who executed a deed to plaintiff for the land in controversy. The relief prayed for in the cross-petition is that the deed executed by the temporary executor be set aside, and that the will be held for naught. The plaintiff in reply denies the allegations of fraud in the cross-petition, and other allegations, which are not expressly admitted, and in an amendment alleges that the cause of action set up in the cross-petition is barred by the statute of limitations. A further recitation of the allegations of the pleadings is not required.

II. In our opinion, the cause must be finally disposed of upon the defense of the statute of limitations, pleaded to defendants' cross-petition. Defendants in that pleading allege the invalidity of the will, and the probate thereof, on the grounds that the testator was *non compos mentis* when it was executed; that it was signed by only one witness before the testator's death, and that the plaintiff fraudulently obtained possession of it, and fraudulently procured its admission to probate, his own appointment as executor, the appointment of a

temporary executor, and the execution by him of a deed to the plaintiff. They pray in effect that the will and probate thereof be set aside. They allege in their cross-petition a cause of action, which if established by proof entitled them to that relief. It will be understood that the cross-petition is an institution of an *action* to avoid the will and the probate thereof. This action is permitted to be prosecuted as a defense to plaintiff's action, on the ground that if it is successful it will defeat plaintiff's action, and for the convenience of the parties, and to avoid the prosecution of two distinct and independent suits instead of one. The law and the practice long prevailing in this court permit the defendants to prosecute their action in this way, joined with the plaintiff's action. Their action is instituted by a pleading called a cross-petition, which in chancery practice is denominated a cross-bill. Code, sec. 2663. It cannot be doubted that the plaintiff may plead any defense to defendants' action presented in his cross-petition, which he could have pleaded, had defendants first brought the action. Nor could it be denied that, if plaintiff establishes his defense pleaded to the cross-petition, defendants' cross-action is defeated with the precise effects that would have followed had the defendants first brought the action. If plaintiff's defense to the cross-petition be established, the will, probate thereof and the deed to him by the temporary executor will all stand for naught, so far as plaintiff's right and claim are concerned, The reply of plaintiff to defendants' cross-petition alleges, and the evidence establishes, that the will was admitted to probate, October 2, 1882. The estate was settled under the will, but the dates of some of the proceedings, as that of the final report of the executor, seem to be erroneously given in the abstract. But these inaccuracies are unimportant, as they all rest upon the validity of the will, and the probate thereof. This action was commenced, January 24, 1889, more than six years and eight months after the probate of the will.

Now, it may be assumed for the purpose of the case that the probate of a will may be set aside after the final settlement of the estate thereunder, if timely proceedings therefor be instituted. We must, therefore, inquire if the defendants' cross-action to set aside the probate of the will, and the will itself, was commenced in time to escape the bar of the statute of limitations.

III. Actions "founded upon unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect," must be brought within five years after these causes accrue. Code, sec. 2529, par. 4. There is no provision of the statute applicable to the cross-action brought by defendants in this case extending the period of limitation. Actions founded on written contracts, on judgments of any courts, except those otherwise provided for, and those brought for the recovery of real property, must be brought within ten years, and those founded upon the judgments of courts of record within twenty years. Code, sec. 2529, pars. 5, 6. These are the only provisions extending the period of limitations beyond five years. It is obvious that neither is applicable to the case in hand. It is claimed in argument that this is an action to recover real estate. The plaintiff's action may be, but defendants' cross-action is not. It is an action to invalidate a will, and to set aside the probate thereof. It is true that the judgment in the action may affect the title in the lands, as it incidentally affects a muniment of title. Other property and other interests are affected by the action, besides those pertaining to land. It cannot be said that an action to set aside and invalidate a judgment of a court of record is an action to recover land for the reason that it affects the titles to lands by removing or maintaining a lien thereon. Nor can it be said in this case that defendants' cross-action is to recover land for the reason that it seeks to set aside a will which is a part of the chain of title to lands. These considerations lead us to the conclusion that defendants' cross-action

is barred by the statute of limitations, and that they cannot defeat the plaintiff's action by assailing in the cross-action the probate of the will. It stands as an adjudication, and, as the time prescribed in which an action may be brought to set it aside has expired, the cross-petition must be dismissed.

II. The claim by defendants for rents of the land in question accruing since the death of the testator cannot be sustained. They claim as joint heirs with the plaintiff, alleging that he has appropriated the rent. But, as under the will he takes the land, of course the defendants are entitled to no part of the rent.

The decree of the district court is AFFIRMED.

ROBINSON, J. (*dissenting*).—I do not assent to so much of the foregoing opinion as holds that the right of action of defendants was barred in five years from the time it accrued. In my opinion the action instituted by the cross-petition is in the nature of an action "for the recovery of real property," and is governed by subdivision 5, of section 2529, of the Code. The phrase "real property" includes "lands, tenements, hereditaments and all rights thereto and interest therein, equitable as well as legal." Code, sec. 45, subdiv. 8. The pleadings show that the plaintiff took possession of the premises in controversy soon after the death of S. B. Willard, under claim of title thereto adverse to defendants, and that he has occupied them continuously since that time. Those facts are not only not denied, but plaintiff insists that defendants are estopped from questioning his title and right of possession, because for several years they acquiesced therein, without objection. It is true defendants ask that the probate of the will be set aside, and the will and all proceedings thereunder be declared null and void, but they also ask that each defendant be decreed to be the owner of an undivided one-sixth of the real estate in controversy, and that plaintiff be compelled to account to them for rents and profits since he took possession of the premises. It is evident that the

ultimate relief they desire is the recovery of the property in dispute, and the rents and profits, and that the setting aside of the probate of the will is a mere incident of that relief. They are interested in the probate proceedings only as they interfere with the recovery of their property rights.

It was said in *Wright v. Leclaire*, 3 Iowa, 221, 234, in effect, that an action to enforce the specific performance of a contract for the conveyance of real estate was as much an action to recover the land as an action of ejectment would be, and that the limitation of the statute in regard to the recovery of real property applied. In *Phares v. Walters*, 6 Iowa, 111, it was held that an action by a widow to recover her dower interest in land which belonged to the estate of her deceased husband, and for a partition thereof, was governed by the statute of limitations in regard to the recovery of real property. The case of *Williams v. Allison*, 33 Iowa, 280, was an action in equity to set aside a sheriff's sale, and quiet title to certain lots in Sioux City. Fraud was alleged as one of the grounds of the action. Subdivision 3, of section 2740, of the Revision of 1860, provided, that actions for relief on the ground of fraud in cases solely cognizable in courts of chancery should be barred in five years from the time the causes of action accrued. But this court held that as the relief sought was in part for irregularities in the sale, and had been granted in courts of law, the five years' limitation did not apply. The court also held that so far as the action related to the lots purchased at sheriff's sale by the defendant against whom the fraud was charged, it was an action for the recovery of real property, and that "the right to have the sheriff's sale set aside was one of the matters to be established in order to maintain the plaintiff's right to recover."

The only notice of the probate of the will in question was given by publication. There was no appearance by defendants in the probate proceedings. The case is within the rule announced in *Gregg v. Myatt*,

78 Iowa, 703. In that case it was said that the parties in interest who had not had notice of the proceedings to probate a will, and who had not appeared therein, were not estopped by such proceedings, and that such parties were not bound by a published notice. But, under the rule announced in the opinion of the majority in this case, such proceedings would have the effect to shorten the time for the recovery of the real property one-half. Indeed, there is ground for claiming that the rule will deprive a person situated as the defendants are in this case of the right to bring such an action until the probate proceedings are set aside. Under that rule plaintiff would have acquired a perfect title to the premises in dispute by virtue of the alleged will, and the probate proceedings, and the lapse of five years from date of probate, even though the defendants had been in actual possession of the premises during that time, under an adverse claim of title, without knowledge of the proceedings in probate. In other words in the case supposed they would have lost a perfect title by reason of proceedings to which they had not been made parties, and of which they had no notice. That seems to me to be contrary to the spirit of our laws, and contrary to the principle expressed in *Gregg v. Myatt, supra.*

In my opinion, under the rule of the case last named, the alleged will and the probate thereof, and the proceedings thereunder, gave to the plaintiff color of title which might have ripened into an absolute one after the expiration of ten years from the time defendants' cause of action accrued, but that during that time defendants have a right to maintain the action instituted by the filing of their cross-petition.

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CARLTON S. MILLER, Appellant, v. JOSEPH BEARDSLEY, Appellee.

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Limitation of Actions: WRITTEN CONTRACTS: ADMISSION OF INDEBTEDNESS: EVIDENCE. In an action upon a promissory note purporting on its face to be barred by the statute of limitations, the plaintiff

may, for the purpose of proving an admission of indebtedness reviving the cause of action, be permitted to prove by oral evidence that the note in suit is a part of a greater indebtedness referred to in a letter written by the maker of the note to the plaintiff since the bar of the statute, and that the person named in said letter, to whom defendant stated he had paid interest on said indebtedness, was the agent of the plaintiff.

Appeal from Fremont District Court.—HON. A. B. THORNELL, Judge.

TUESDAY, JUNE 3, 1890.

ACTION commenced March 15, 1889, to recover upon two promissory notes for fifteen hundred dollars each, dated March 20, 1875, one due in two, and the other in three, years after date. By an amendment plaintiff alleged that on March 28, 1886, the defendant wrote, signed and mailed to plaintiff a letter concerning said notes, which was received by plaintiff, and is as follows:

"It is some time since I wrote; thought I would write you a few lines. On Saturday, the twenty-seventh inst., I paid S. S. Wilcox interest on nine thousand dollars which you have received probably before this time, part of which was not due. Mr. Wilcox figured the interest out that was not due, saying he did not know how you would like it. If that does not meet with your approval we will fix it some other way. I had the money and thought you could use it, and probably it would not make any difference, as I had to get exchange on New York to get it all at one time. The small note I did not pay as I shall be at considerable expense this summer on my last purchase of De Forrest.

"[Signed.] JOSEPH BEARDSLEY."

The amendment states that defendant was at that time indebted to plaintiff in the sum of nine thousand dollars, of which said notes were a part; that the interest referred to was in part on said notes; that said Wilcox was agent of the plaintiff for the purpose of receiving said interest; and that it was paid to him as such agent. Defendant demurred upon the ground

that the action was barred by the statute of limitation, which demurrer was sustained, and plaintiff appeals.

Jas. McCabe, for appellant.

Geo. E. Draper, for appellee.

GIVEN, J.—I. The causes of action stated are confessedly barred unless revived under section 2539, of the Code, which provides that "causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. But such an admission or new promise must be in writing, signed by the party to be charged thereby." The admission or promise can only be proven by such writing, bnt when an admission or promise is so evidenced, other proofs are admissible to show the writing, and that the debt admitted or promised to be paid is the particular debt sued upon. *Penley v. Waterhouse*, 3 Iowa, 445; *Collins v. Bane*, 34 Iowa, 385; *Wise v. Adair*, 50 Iowa, 104; *Stout v. Marshall*, 75 Iowa, 498. The allegation that Beardsley was at the time indebted to plaintiff in the sum of nine thousand dollars cannot be considered except as shown by the writing, because, as we have seen, the indebtedness can only be established by an admission or promise in writing. To show a different indebtedness from that sued upon is immaterial. In determining whether the letter shows an admission that the debt is unpaid, or a promise to pay the same, we may consider the allegation that Wilcox was agent for the plaintiff, and that the interest was paid to him as such agent.

From these allegations and the letter, we have this state of facts: That on March 27, 1886, defendant paid to S. S. Wilcox, as agent for plaintiff, interest due and that was not due on nine thousand dollars. While it is possible that interest may be due from one party to another, without there being any indebtedness for the principal upon which it accrued, such is seldom the

case. In the absence of proof to the contrary the payment of interest warrants the conclusion that there is an indebtedness for the principal. When, as in this case, the payment is of interest due and not due, the evidence of an existing indebtedness is much more satisfactory. We are of the opinion that the letter, considered in the light of the fact of Wilcox's agency, shows an admission of an indebtedness from defendant to plaintiff that is unpaid, and that if plaintiff can prove, as alleged, that the two notes in suit constitute a part of that indebtedness, the cause of action was revived by said letter.

It follows from these conclusions that the judgment of the district court should be REVERSED.

MARY LARKIN, Appellant, v. ELLEN MCMANUS, Appellee.

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1. **Pleading**: AMENDMENTS: TIME OF FILING. Permission to file an amendment to a pleading after the evidence is closed in a cause tried to the court, and the opening arguments of counsel for the respective parties have been made, will not be disturbed upon appeal when no abuse of discretion is shown.

2. **Will**: HOMESTEAD: ELECTION BY WIFE: PRESUMPTION FROM OCCUPATION. A will left by a husband gave to his wife one-third interest in his property, consisting of a homestead, and to his daughter the remaining two-thirds. The widow and her son, with the defendant, a daughter by another husband, occupied the premises until the widow's death, a period of nearly ten years, but there was some evidence that such occupation was not exclusive of the rights of the daughter owning the two-thirds under the will, though she did not reside there. Shortly before the widow's death she conveyed her interest in the property to defendant. *Held*, that the conduct of the widow did not amount to an election to take her homestead right under the statute, Code, section 2008, instead of under the will, and that the conveyance to the defendant passed an undivided third interest in the property.

Appeal from Lee District Court.—HON. J. M. CASEY, Judge.

WEDNESDAY, JUNE 4, 1890.

ACTION at law for the recovery of real property. There was a trial by the court, and a judgment in favor of defendant. The plaintiff appeals.

J. F. Smith, for appellant.

W. J. Roberts, *Jas. C. Davis* and *P. J. Lomax*, for appellee.

ROBINSON, J.—Plaintiff claims to own in fee simple lot 12, in block 164, in the city of Keokuk, and to be entitled to the immediate possession thereof. The title to the lot was acquired by William Larkin in the year 1870. He occupied the lot as a homestead at the time of his death, in December, 1877. He had been married three times, and left surviving him the plaintiff, who was his daughter by his first wife, his third wife, and a son by his third wife. The defendant was a daughter of his third wife by a former husband. Larkin died testate. His will was duly probated on the twelfth day of June, 1878, and reads as follows: "I, William Larkin, * * * do make this my last will and testament, to-wit: That my wife, Ellen Larkin, shall have her one-third interest in my property, which consists of my homestead, on the corner of Eleventh and Morgan streets; and that my daughter, Mary Jane, shall have the remaining two-thirds of same property * * *."

After the death of Larkin, his widow and son, the defendant, and another daughter of the widow, continued to make the property their home until the death of the widow, which occurred on the third day of June, 1886. On the twelfth day of May, 1886, the widow conveyed to defendant all her interest in said property. Two years after the death of Larkin, defendant went to her mother's home to take care of her. Since the death

of the widow the defendant and her brother, the son of Larkin by her mother, have continued to live in the property. The plaintiff worked away from home a part of the time after her father's third marriage, and since his death has worked away from home all the time excepting when she returned to it for short visits. The court found that plaintiff was the owner of an undivided two-thirds, and the defendant of an undivided one-third, of the property in controversy, and dismissed the petition of plaintiff at her costs.

I. The first answer of the defendant was a general denial of the allegations of the petition excepting as to the death of William Larkin. After the evidence had been fully submitted, and after the opening arguments for the respective parties had been made, the defendant filed what is termed an amended answer. That alleged that William Larkin left surviving him a son, who is still living; that said son and plaintiff are the only heirs of said decedent; that said son is the owner of an undivided one-sixth of the property in controversy, and that he is now occupying the same, and that defendant with his knowledge and consent is occupying it with him; that defendant is the absolute owner of an undivided two-thirds of the property in controversy. On the same day, plaintiff moved to strike the amended answer from the files, on the ground that it presented a new issue, and was filed too late, but the motion was overruled. It does not appear that there was any abuse of the discretion vested in the court to permit amendments. Code, sec. 2689. The purpose of the amended answer was to conform the pleadings to the facts proved. There was no substantial change in the defense made, and no error in permitting the amendment.

1. PLEADING: amendments: time of filing.

II. The only property left by the testator was the homestead in question. His manifest intent as expressed by the will was to give his wife, in lieu of the rights provided by law, an undivided one-third of that property, and to plaintiff the remainder. Each devisee

2. WILL: homestead: election by wife: presumption from occupation.

was to take the estate given by the will at the same time; therefore, there is no room for holding that it was the intent of the testator to give to his wife an undivided one-third of the property in fee simple, in addition to the right which she might claim under the statute to occupy the premises as a homestead during her lifetime. Code, sec. 2008; *Snyder v. Miller*, 67 Iowa, 261; *Severson v. Severson*, 68 Iowa, 656. It does not appear that the widow ever consented to take under the will, in the manner prescribed by section 2452 of the Code. She continued to occupy the place as a home until her death, and, if there were nothing to show an abandonment before that time, it might be held that she elected to retain the homestead for life in lieu of a dower. *Darrah v. Cunningham*, 72 Iowa, 123, and cases therein cited. But there was some evidence tending to show that her occupation was not exclusive nor adverse to plaintiff; that the interest of plaintiff in the premises was recognized, and that she had the privilege of occupying them with her step-mother. The conveyance of the latter to defendant made in May, 1886, was effectual to convey her interest in the property, and necessarily terminated her homestead right. It was said in *Butterfield v. Wicks*, 44 Iowa, 310, in effect, that the continued occupation of the homestead by the surviving husband or wife might be regarded as evidence of an election to hold it as a homestead, and not a part of it merely as dower. And in *Conn v. Conn*, 58 Iowa, 748, it was said, that such occupation continued for more than ten years should be regarded as an election to take the homestead for life. In this case the occupation under claim of title was not continued for life, and had not continued ten years when the conveyance to defendant was made. We, therefore, conclude that the court might have found from the evidence that the widow had not elected to retain the homestead for life in lieu of her distributive share in the estate of her late husband, and that her deed to defendant was effectual to convey an undivided one-third of the property in controversy.

III. Objections are made to some of the evidence introduced. A part of that objected to was immaterial and might properly have been excluded, but it did not relate to any disputed fact material to the determination of the case, and its admission was not, therefore, prejudicial.

IV. It does not appear that defendant ever denied the title of plaintiff excepting perhaps in her amended and substituted answer, but nothing is claimed on account of that; therefore, under section 3248 of the Code, the plaintiff must fail.

The judgment of the district court is AFFIRMED.

O. S. GARRETSON, Appellee, v. MERCHANTS & BANKERS' INSURANCE COMPANY, Appellant.

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1. **Fire Insurance**: POLICY: CONDITIONS: CONSTRUCTION. Permission in a policy of fire insurance to use the insured premises for "any mercantile purpose" will not authorize their use as a restaurant.

2. ——: ——: ——: WAIVER: AGENTS. An agent of a fire insurance company employed to solicit risks, deliver policies and collect premiums, and having no authority to make contracts, cannot bind the company by his consent to an unauthorized use of the insured premises, nor waive a forfeiture of the policy resulting from a breach of its conditions.

3. ——: ——: PLEADING: EVIDENCE. The plaintiff pleaded in one count of the petition an oral agreement on the part of defendant to procure additional insurance, to which plea there was a general denial. The issue thus formed was withdrawn from the consideration of the jury. *Held*, that there being no evidence of the power of defendant to enter into such a contract, nor of the agent's authority to bind the company by such a contract, the issue was properly withdrawn. [BECK and GIVEN, JJ., dissented from the opinion of the majority upon the last point.]

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

WEDNESDAY, JUNE 4, 1890.

ACTION upon a policy of insurance. There was a judgment upon a verdict for plaintiff from which the defendant appeals.

Baker & Haskins, for appellant.

Whiting S. Clark, for appellee.

BECK, J.—I. The policy sued on contains a condition against the use of gasoline, or other similar material, or gas produced therefrom, and providing that a disregard of the prohibition shall void the policy. The evidence shows, without contradiction, that at the time of the fire a gasoline stove was in use in the room of the house where the fire originated, and a gallon of gasoline was at that time in the tank of the stove. The plaintiff claims that the forfeiture of the policy by reason of this breach of its condition was waived by reason of the alleged existence of these facts: *First.* That defendant's agent was informed of, and consented to, the use of the building as a restaurant, which includes the use of a gasoline stove. *Second.* That subsequent to the loss the defendant claimed no forfeiture, but required plaintiff to furnish proof of loss, which was done at his expense. The alleged facts upon which are grounded these claims of plaintiff, briefly stated are these: *First.* The application indorsed upon the policy declares that the building insured is to be occupied and used for "any mercantile purpose." *Second.* That the agent of the defendant was informed of, and assented to, the use of the building as a restaurant. *Third.* That the use of a gasoline stove is usually necessary in carrying on a restaurant. *Fourth.* That after the loss the agent of defendant had knowledge of the use of the gasoline stove, and the defendant required proofs of loss, which were furnished at plaintiff's expense.

1. FIRE INSURANCE: POLICY: CONDITIONS: CONSTRUCTION.

II. The permission to use the building for "any mercantile purpose," granted pursuant to plaintiff's application, does not authorize the use for a restaurant, which is not a mercantile purpose. The word "*mercantile*" means "pertaining to merchants, or the business of merchants; having to do with trade, or the buying and selling of commodities; commerce." Webster. The business of keeping a restaurant is in no sense commerce. If a restaurant be a mercantile establishment, the term is equally applicable to taverns, boarding-houses and the like, which cannot be admitted. The point demands no further attention. Permission to use a building for "any commercial purpose" does not authorize its use as a restaurant. The ninth instruction given to the jury is in conflict with these views, and is, therefore, erroneous.

III. The evidence shows without dispute that the officers of the defendant had no knowledge of, or information as to, the use of the building. There is evidence tending to show that defendant's soliciting agent was informed of, and assented to, the use of a building for a restaurant. And the evidence without conflict shows that the agent had no other power than to solicit risks, deliver policies and collect premiums, and his authority extended no further. He possessed no special authority to do any acts, or to make any contracts which would have the effect to waive any condition of the policy. Agents of insurance companies clothed with authority to enter into contracts of insurance for their companies, *i. e.*, to issue policies, may waive conditions in the policies and forfeitures arising thereon. But agents possessing the limited powers of soliciting insurance, delivering policies and receiving premiums cannot waive conditions and forfeitures. As they have no authority to make contracts, they cannot be allowed to waive the conditions. *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Armstrong v. State Ins. Co.*, 61 Iowa, 212. If it be assumed that the defendant's agent had knowledge of the use of the building as a restaurant,

2. —: —: —: waiver: agents.

and assented thereto, and even knew of and assented to the use of a gasoline stove, the defendant is not bound thereby, for the reason that the agent did not act within the scope of his authority. In our opinion the evidence wholly fails to support the verdict, in that there is no evidence tending to prove that the defendant had any knowledge of, or assented to, the use of the building for a restaurant, or that at any time before or after the fire, and prior to their direction as to proof of loss, defendant's officers had any knowledge of the use of a gasoline stove in the premises. The evidence, too, does not show, nor tend to show, that the agent had authority to waive any conditions of the policy or any authority other than to take applications for and solicit insurance, deliver policies and collect premiums. The jury could not have found for plaintiff unless they had found these things. The verdict, therefore, is so without the support of the evidence, that it ought to have been set aside.

Other questions presented in argument by defendant's counsel need not now be discussed as the judgment must be reversed for the errors just pointed out.

IV. There were two counts in the petition, the second being upon an oral agreement to procure additional insurance, The court in its instructions to the jury informed them, that "the second count in the petition is withdrawn from your consideration." To this instruction plaintiff excepted, and, from the ruling of the court in giving the instruction, appeals.

3. —: —: pleading: evidence.

The record fails to show that this count was assailed by demurrer or motion, or to present any ground upon which the instruction was based. But it does show that issue was taken upon the count by a general denial, and by a special defense based upon the ground that the contract set up in the count is not within the power of the defendant to make, but is *ultra vires*. The record does not show that the court held, and so directed the jury, that there was not sufficient evidence to support the cause of action on the second count; it simply shows in the opinion of Mr. Justice GIVEN and myself, that

the court below arbitrarily, and without being required to pass upon the sufficiency of the count by motion or demurrer, withdrew it from the consideration of the jury while an issue was pending thereon, which ought to have gone to the jury. In the opinion of Mr. Justice GIVEN and myself the ruling and instruction are plainly erroneous for the reason that, in place of an adjudication upon the law and the facts involved in the second count, they substitute the withdrawal of the count from the consideration of the jury.

A majority of the court hold that the instruction and order are tantamount to an order for a nonsuit, or a direction for a judgment for defendant on the second count, and that there was an utter want of evidence to show the power of the defendant to enter into the contract upon which the second count is based, or to show that the agent of defendant had any authority to bind the company by such a contract; his power, they hold, is shown to be restricted to soliciting risks upon which defendant should issue policies. Mr. Justice GIVEN and myself think differently, holding that, as the defendant was authorized by its articles of incorporation to transact the business of the "insurance of the property of its members," it was thereby empowered to make contracts binding it to procure or furnish such insurance to its members by policies in other companies, and that, as the agent was authorized to solicit insurance, and to take applications for policies, he had power to solicit contracts for insurance in other companies, and bind defendant by such contracts therefor.

A majority of this court think that the judgment of the district court on the second count ought to be affirmed. Mr. Justice GIVEN and myself would reverse it. REVERSED ON DEFENDANT'S APPEAL, AND AFFIRMED ON PLAINTIFF'S APPEAL.

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NEW ENGLAND LOAN & TRUST COMPANY, Appellant, v. J. R. YOUNG, Treasurer, *et al.*, Appellees.

Taxes on Personal Property: LIEN ON REAL ESTATE: PRIORITY OF LIENS. **Taxes levied upon personal property subsequent to the foreclosure of a mortgage against real estate owned by the taxpayer, and to the sale thereof under special execution, but while the right of redemption remains in the taxpayer, become, under the provisions of Code, section 865, a lien upon such mortgaged real estate, which is entitled to priority over the rights of the purchaser at the foreclosure sale. [GRANGER and ROBINSON, JJ., *dissenting*.]**

Appeal from Union District Court.—HON. JNO. W. HARVEY, Judge.

MONDAY, JUNE 27, 1890.

THIS is an action in equity to restrain the defendant, who is treasurer of Union county, from proceeding to collect certain taxes by the sale of real estate, claimed to be owned by the plaintiff. There was a decree for the defendant, and plaintiff appeals.

E. D. Samson, for appellant: Section 865 of the Code of Iowa provides that taxes upon real estate shall be a perpetual lien thereon against all persons except the United States and the state of Iowa, but taxes upon personalty are made by that section only a lien upon any real property owned by such person, or to which he may thereafter acquire title. The order of priority of lien is not fixed, nor is any attempt made to fix it in the statute. This must mean that taxes upon personalty are a lien upon the interest of the taxpayer in the realty, and can mean nothing more. It is against public policy to require purchasers and mortgagees of property to be subjected to contingencies which it is impossible to avoid or provide against. *Cummings v. Easton*, 46 Iowa, 185, 186. Taxes upon personalty do

not become a lien upon the realty of the taxpayer until they are due, or at least not until they are levied. *Castle v. Anderson*, 69 Iowa, 429, 430. In the case now before the court, the right of the plaintiff as mortgagee attached in June, 1886. The plaintiff, on April 23, 1887, became a purchaser at sheriff's sale of the premises, under foreclosure of this mortgage, and the amount of the bid was determined with respect to such liens only as then existed. The tax upon personalty for 1887 had not at the time of the execution of the said mortgage in June, 1886, nor at the time of the purchase of said premises at sheriff's sale on April 23, 1887, been levied, nor had they become due, and under the case of *Castle v. Anderson*, above cited, the lien for such personal taxes had not, at either of said dates, attached. The lien of the said taxes, when they became due, certainly did attach to whatever interest the defendant Syp had in the said premises, but what was such right? It was the right only to make redemption of the premises from sheriff's sale within the time allowed by law therefor. Upon a failure to exercise such right, all of his interest in the premises would, by mere lapse of time, and within a year from April 23, 1887, expire and be absolutely gone. It was not the intention that the conveyance to the plaintiff should effect a merger of plaintiff's lien under the sheriff's certificate in the legal title. The principle is now well settled that, in case of conveyance of the legal title to realty to one who holds the lien thereon, a merger will not result if it is to the interest of the lienholder and grantee that the fact should be otherwise. *Linscott v. Lamart*, 46 Iowa, 314, 315, and *Delaware Construction Co. v. Railway Co.*, 46 Iowa, 411, 412.

Enoch & Winter, for appellee: On the tenth day of February, 1888, W. K. Syp and wife executed a deed to the appellant, conveying the lands described in their mortgage, and the foreclosure decree. By this deed the appellant, the then holder of the sheriff's certificate

under foreclosure decree, became then the absolute owner of all the lands sold on foreclosure decree. At this time the personal tax of the said W. K. Syp was due, carried on the treasurer's books of Union county, Iowa, opposite his name, against said lands, and was a lien on the face. Taxes on personal property become a lien on real property owned by the person owing such tax as soon as the same becomes due, which would be when they were placed in the treasurer's hands for collection, and he had an opportunity to pay them, which would be in this case on January 1, 1888. *Paulson v. Rule*, 49 Iowa, 576; *Garretson v. Scofield*, 44 Iowa, 35; *Cummings v. Easton*, 46 Iowa, 183. As appellant took Syp's interest in the lands charged with the tax in question, by conveyance from Syp, subsequent to the attaching of the lien, they took it subject to the lien, and they cannot now be heard to dispute the right of the treasurer to collect said tax by the sale of said lands.

E. D. Samson with *Kauffman & Guernsey*, upon rehearing: The deed to the plaintiff cuts no figure whatever in this case, for plaintiff's rights depend, not upon the relinquishment, but upon its lien under, and by virtue of, the mortgage, and of the certificate of sale under the foreclosure, and the sheriff's deed issued to plaintiff thereon. *First*, let it be noted that taxes are not a lien at common law upon the property of the taxpayer. The lien for taxes exists only by legislation. If there were no legislation in the state upon the subject no taxes levied in the state would constitute a lien upon any property whatsoever. *Jaffray v. Anderson*, 66 Iowa, 719. Looking now to the statute, it will be seen (Code, sec. 865) that a marked distinction is made between taxes upon realty and those upon personalty, so far as relates to the lien thereof upon real estate. It will be noted that while the taxes upon the realty itself are made a paramount lien as against all persons, yet such is not the case so far as concerns personal taxes. A careful reading of this statute will make it impossible

for it to be so construed as to give personal taxes priority over liens which had attached to the premises prior to the time when the personal taxes became liens. The rule is that statutes which give liens for taxes are not to be enlarged by construction. Cooley on Taxation [2 Ed.] 444. A mortgagee is, to the extent of his investment, entitled to as favorable consideration, and as high protection, as a purchaser of the mortgaged premises, as a vendee of the same would be under like circumstances. *Barney v. McCarty*, 15 Iowa, 514; *Porter v. Greene*, 4 Iowa, 571; *Hewitt v. Rankin*, 41 Iowa, 35; *Koon v. Trammel*, 71 Iowa, 137. The purchaser at an execution sale of premises is protected under the decisions of this court against all outstanding equities in favor of third parties, and all claims against the execution defendant to the same extent as would be a purchaser of the premises at private sale from the debtor himself. *Gower v. Doheny*, 33 Iowa, 36; *Butterfield v. Walsh*, 36 Iowa, 534. If appellant had purchased the property of this taxpayer at the time of taking its mortgage, it would have been protected under the rule in *Castle v. Anderson*, 69 Iowa, 429; *Cummings v. Easton*, 46 Iowa, 183. In the case of *Parsons v. Gaslight & Coke Co.*, 108 Ill. 380, the doctrine is expressly held, that personal taxes cannot displace a prior trust deed. The same doctrine is held in Pennsylvania, *Gormley's Appeal*, 27 Penn. St. 49; and in New Jersey, *Macknet v. The City of Newark*, 42 N. J. Law Rep. 38.

ROTHROCK, J.—The cause was submitted to the court below upon an agreed statement of facts. It involves less than one hundred dollars, and the certificate of the trial judge, which is the basis of the appeal, shows the following facts in substance: In June, 1886, one W. K. Syp executed to the plaintiff a mortgage upon certain real estate to secure the payment of ten thousand dollars and interest. Syp failed to pay the interest which became due January 1, 1887, and, at the March term, 1887, of the district court, plaintiff

recovered a judgment against Syp for the overdue interest, and a decree of foreclosure of the mortgage, subject to the rights of plaintiff's assignee, for the remainder of said indebtedness. The premises were sold at foreclosure sale on the twenty-third day of April, 1887, the plaintiff being the purchaser at the sale, and a certificate of purchase was issued to the plaintiff. On the tenth day of February, 1888, Syp conveyed his right of redemption to said premises. The deed contained the following recitals:

"The grantors herein are to be released from personal liability for the payment of the mortgage upon the said premises for the sum of ten thousand dollars to the grantee herein, dated June 22, 1886. We hereby covenant with the said New England Loan & Trust Company that we have not heretofore conveyed our interest in the said premises to anyone. The object of this deed is to make more effectual the lien of said company against the said premises by virtue of the sheriff's certificate of sale which they hold against the same."

Taxes to the amount of seventy-five dollars upon the personal property of Syp were levied for the year 1887, and were entered upon the tax books against said real estate. The question to be determined is, do the taxes for 1887 upon the personal property of Syp constitute a lien upon the land, which may be enforced by tax sale, and, if so, is such lien superior or inferior to plaintiff's lien under said foreclosure decree and sale? The district court held that the taxes were a valid lien upon the land superior to any lien or claim of the plaintiff. If the taxes had become a lien prior to the foreclosure and sale, there can be no question that they would be prior and superior to the mortgage lien. It is a general principle that when taxes are made a lien upon real estate they are prior and superior to all mortgage or judgment liens. A mortgagee of real estate would not cut much of a figure in attempting to defeat a tax sale of the land upon the grounds that his mortgage was a lien prior to the taxes, and that his lien

exceeded the value of the land. But plaintiff contends that, as this tax did not become a lien until after the sale on foreclosure, Syp had nothing to sell but his right of redemption, and that as he was not then the owner of the land the taxes are not a lien as against plaintiff. It will be observed that the taxes became a lien after the sale and during the period allowed by law for redemption. We are unable to see that this affects the rights of the parties. The mortgagor was not divested of the property by the foreclosure sale; he held the title, and the right of possession remained in him until the period of redemption expired. He was the owner of the land within the meaning of section 865 of the Code, which, by its express provision, makes the personal tax a lien upon the premises.

The fact that he conveyed the land to the plaintiff after the tax became a lien cannot affect the question. Plaintiff could not defeat the lien for taxes under any form of conveyance taken from Syp.

We think the court did not err in finding that the taxes were a lien upon the land. AFFIRMED.

UPON REHEARING.

GIVEN, J.—I. This case was submitted at a former term, and an opinion rendered affirming the decree of the district court. In view of the nature and importance of the questions involved, a rehearing was granted, and the case has again been carefully considered. It is an action in equity to restrain the defendant, who is treasurer of Union county, from proceeding to collect certain taxes on the personal property of one Syp, by the sale of real estate claimed to be owned by appellant. There was a decree for the defendant, and plaintiff appeals. The case involves less than one hundred dollars, and the certificate of the trial judge shows the following facts: In June, 1886, one W. K. Syp executed to appellant a mortgage upon certain real estate in Union county, to secure the payment of ten thousand dollars and interest. Syp failing to pay the interest,

which became due January 1, 1887, at the March term, 1887, of the district court, appellant recovered judgment against Syp for the overdue interest, and a decree of foreclosure of the mortgage. The premises were sold at foreclosure sale on the twenty-third day of April, 1887, to appellant, and a certificate of purchase issued. On the tenth day of February, 1888, Syp conveyed his right of redemption to appellant,—the deed containing the following recitals: "The grantors herein are to be released from personal liability for the payment of the mortgage upon the said premises, for the sum of ten thousand dollars to the grantee therein, dated June 22, 1886. The object of this deed is to make more effectual the lien of said company against the said premises by virtue of the sheriff's certificate of sale, which they hold against the same." Taxes to the amount of seventy-five dollars upon the personal property of Syp were levied for the year 1887, and entered upon the tax books against said real estate. The questions to be determined are, whether the taxes upon the personal property of Syp for the year 1887 became a lien upon the real estate, and, if so, whether such lien is superior to appellant's lien under the mortgage foreclosure, decree and sale.

The general rule is that taxes are not a lien unless expressly made so by statute, and, when created, the lien is not to be enlarged by construction. Cooley, Taxation, 444; *Jaffray v. Anderson*, 66 Iowa, 719. Turning to section 865 of the Code, we see that "taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire title." This lien is upon the real property, not upon any particular interest in it. It is upon any real property owned by the person against whom the tax has become due. The lien attaches when the tax becomes due, which for the purposes of this case may be taken as January 1, 1888; without now determining whether such taxes became due at the time of the levy, or when the books are placed in the hands of the treasurer. *Castle, Trustee, v. Anderson*, 69 Iowa,

428. The statute has plainly created a lien for this tax upon any real property owned by Syp at the time the tax became due, and our inquiry is not whether a lien should be created or enlarged, but whether, on January 1, 1888, Mr. Syp was the owner of the real property described. The ownership was not extinct nor suspended,—it existed either in Syp or the appellant. Under the modern rule, appellant, as mortgagee, was merely the holder of a lien, which continued so long as the mortgagor had the right to extinguish it by payment. The decree and sale did not terminate that right. Under the law, the time of the sale merely determined the time when that right would be cut off. The relations of the parties to the property were not changed by the sale, except that the costs were added to the indebtedness, and the time within which Syp might extinguish the lien changed. Certainly appellant was not the owner of the property in such sense as that taxes on personal property due from him would become a lien upon the property before title was acquired, by the expiration of the right to redeem. Mortgaged property is not subject to lien for taxes on personal property due from the mortgagee, because, as mortgagee, he is not the owner, but a mere lienholder. On January 1, 1888, Syp held the legal title, subject only to the lien of the decree and sale, which he had a right to remove by payment at any time before April 23, 1888. It is not to property held by absolute ownership that the lien attaches, but to real property owned. This real property was owned by Syp when the taxes against him became due, and, therefore, under the statute those taxes became a lien upon that real property. To hold otherwise would deny to the state a lien expressly created by statute. As this question of ownership rests entirely upon the facts as they existed January 1, 1888, the deed thereafter made by Syp to appellant is immaterial.

II. Upon the question as to the superiority of these liens, it is urged that the statutes do not expressly declare the lien for taxes on personal property superior

to other liens previously acquired. That to hold it superior is to enlarge the lien and impair real-estate securities, discourage sales on time, and, in effect, take the property of one person to pay the taxes of another. The lien is upon real estate, and not upon any particular interest therein. It is not a mere personal claim against the owner, but a charge upon the land. *Garretson v. Scofield*, 44 Iowa, 37. It is a general principle in our system of taxation that, when taxes are made a lien upon real estate, they become prior and superior to all mortgage or judgment liens. Were it otherwise, the state in the collection of her revenues would be placed in the attitude of a junior lienholder, and forced to redeem from prior liens, or be defeated in the collection of her taxes. The power of taxation is an incident of sovereignty, and the exercise of that power cannot be defeated by asserting superiority for the claims of individuals. The statute is silent as to any authority to redeem on behalf of the state, and the slightest reflection will show how entirely impracticable it would be to pursue such a course in the collection of taxes. The statute creates the lien against the land, and it is no enlargement of it to say that the land is held for its payment in preference to all other liens. It is sufficient answer to all that is said as to the effect that such a holding will have upon real-estate securities and transactions to say, that it is entirely within the power of those taking such securities to protect themselves. They take their securities knowing that personal-property tax may become a lien upon the property pledged, and that the state cannot be embarrassed in the collection of its revenue by being put in the position of a junior lienholder. It is a matter of common observation that mortgages are generally taken with sufficient margin, and ample provisions, to protect the mortgagee against the consequence of liens for taxes on personal property. We fail to discern wherein the holding of this property liable to the personal tax of Mr. Syp is taking the property of appellant to pay Mr. Syp's taxes. It was not the appellant's property at the time the lien

attached. We cannot concur in the conclusions of the courts, as announced in *Macknet v. Newark*, 42 N. J. Law, 45, and *Parsons v. Gaslight & Coke Co.*, 108 Ill. 384, cited by counsel. A careful review of the case, in the light of the additional arguments and citations, confirms us in the conclusion announced in the former opinion.

GRANGER, J. (*dissenting*).—The first division of the majority opinion determines that the personal property tax is a lien on the real estate, and of the correctness of that rule I make no question. The second division deals with the question of priority of liens, and upon that question I dissent from the rule announced, and base my conclusion upon three propositions: *First*, that the rule announced does not reflect the letter or spirit of the statutes sought to be interpreted; *second*, that it is opposed to natural justice; and, *third*, that it contravenes every authority known to us on the subject. The propositions will be briefly noticed in the order stated.

As the main reliance is now placed on the opinion filed on rehearing, my references will be, mainly, if not entirely, to the reasoning in that opinion. It is there stated that "the general rule is that taxes are not a lien unless expressly so made by statute, and when created the lien is not to be enlarged by construction." That rule is acceptable, and is to be kept in view, for, in my judgment, its teaching is forgotten in the reasoning of the opinion. The opinion quotes but a portion of the statute essential to a correct conclusion. I quote as follows, inclusive of that quoted by the majority: "Taxes upon real property are hereby made a perpetual lien thereon against all persons except the United States and this state, *and taxes due from any person upon personal property shall be a lien upon any real estate owned by such person, or to which he may acquire title.*" The italicized portion is that quoted in the other opinion. I first inquire if there is anything in the italicized portion, taken alone, that should make such a lien paramount to one formerly

acquired. The language does nothing more than create a lien. It makes no reference whatever as to priority, or against whom it is a lien. Now, I must assume that the rule is that liens take priority in the order of their becoming liens, and, when they do not, it is the result of an exception and not of the general rule. Divest the case of the consideration as to public revenues, and apply it as between persons, and a court could not be found to give priority to the lien latest in point of time. The holding in this case comes, then, from a supposed necessity of aiding the public revenue, and that is the reasoning of the opinion. It is entirely from construction, then, that the taxes became a prior lien, for the other lien was certainly, in fact, prior. What have we done, then, less than to "enlarge by construction" the lien given by the statute, and in violation of the very rule announced in the opinion?

But I think a greater mistake is in leaving the other part of the section without consideration in determining the question before us. We are told on authority that "it is the most natural and genuine exposition of a statute to construe one part by another part of the same statute, for that best expresses the meaning of the makers." Let us apply the rule to this case. It will be observed that the legislature, in creating the statute in question, was not only providing that taxes should become a lien upon property, but also against whom the lien should exist; and, with that in view, it enacted as to real property that taxes thereon should be "a perpetual lien thereon against all persons except the United States and this state." That language is unmistakable, and makes the lien against all persons, and is the kind of language the legislature selected to express such an intent. If it intended the same as to taxes on personal property, would it not, in reason, have employed the same or equally specific language? As to real property, it not only prescribed the lien, but those against whom it should exist, "all persons." As to personal property, it

prescribed the lien, but not that it was against all persons, and left it to be governed by the general rule as to priority. What the legislature seemingly declined to do, this court has done by construction, and made the lien alike as to both classes of property. I say with much confidence that the different language used as to the two classes of property is indicative of a different legislative intent, and that intent should be the guiding star of interpretation.

I base the proposition that the construction is against natural justice on the fact that, as a result, the property of one person may and is likely in some instances to be taken to pay the taxes or obligations of another, and any law enacted with such a purpose in view would meet with general condemnation. Let us suppose that A is the owner of forty acres of land of the value of one thousand dollars, which he sells to B, and takes back a mortgage to secure two-thirds of the purchase price. Such occurrences are usual. It is true, also, that there are persons in Iowa whose unpaid personal-property taxes will aggregate large amounts,—we may say one thousand dollars or more. I will designate C as one of them. B transfers the title of the forty acres of land to C. C has now acquired the title, and the taxes without question become a lien. The majority opinion makes them a paramount lien, and nearly seven hundred dollars of A's money or property is taken to pay the debt of C. It is said by the majority opinion that "it is entirely within the power of those taking such securities to protect themselves." I fail to see how, unless A shall refuse to sell his land upon credit. If the opinion has especial reference to those who loan money, I fail to see how they are able to do so. Conceding, for argument, that they might reasonably do so, as to the mortgagor, it does not follow that the title might not be conveyed until it would rest with one whose unpaid taxes would impair, if not destroy, the security. It is not an answer to say that such instances would be rare. Such a law

could have no vindication against a single instance of such injustice. While extreme cases might be unusual, those of lesser magnitude would likely be frequent. I think the effect of the majority opinion is broader and deeper than has been anticipated, and is likely, with ill effect, to visit all classes of people. The public demands for the collection of revenues are urged in support of the construction. Conceding all that the public good requires in that respect, and I must deny that there is one consideration of a public nature in support of so unjust a rule. It is said in the opinion that "it is a general principle in our system of taxation, that, when taxes are made a lien upon real estate, they become prior and superior to all mortgage or judgment liens." If that statement is made with reference to taxes upon real estate, I do not question it. If made as applicable to the facts of this case, I am compelled to question its accuracy, and to insist that every adjudication upon such a state of facts known to this court announces a contrary doctrine; and I am unable to find an instance where such a rule has recognition.

I have said that the rule announced contravenes every authority known to us on the subject. The supreme court of New Jersey, in construing a law equally favorable to the view of the majority, used this language: "An intention to give such a tax priority in any case should not be imputed to the law-makers in the absence of unmistakable language to that effect. While the law when it is clearly written must be enforced according to the letter, however harsh and impolitic it may appear to the judicial mind, in a case of real doubt and ambiguity, the consequences of a particular interpretation may be regarded. To declare that a mortgage on land shall be subsequent to all after taxes assessed on the personal estate of the owner of the equity of redemption differs but slightly from taking the property of one citizen to pay the debt of another. The injustice of such a proceeding would be so striking as to cast a doubt upon

the correctness of the interpretation which establishes such a rule." *Macknet v. Newark*, 42 N. J. Law, 45. I can add nothing to the significance of the language used. The statute of Illinois provides for making the taxes upon personal property a lien on real estate, but, as against a deed of trust made prior to the lien for the taxes, the latter was held subsequent to the deed. *Parsons v. Gaslight & Coke Co.*, 108 Ill. 380. Some importance is attached by the majority opinion to the fact that no provision is made for the state to redeem from prior liens. Such a fact does not aid the construction given, nor is such a redemption necessary. If the lien for the taxes is junior, the interest or equity of redemption of the tax debtor may be sold subject to the prior lien, which method absorbs all the debtor owns, and that is all any creditor, whether public or private, should in conscience demand. In my judgment the lien for taxes should be held junior to the mortgage.

ROBINSON, J., concurs in this dissent.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

The cases reported under this head were not deemed to be of sufficient importance to be reported in full.—REPORTER.]

THE STATE OF IOWA, Appellee, v. HOGAN, Appellant.

Appeal: RECORD: ABSTRACT.

Appeal from Plymouth District Court.—HON. SCOTT M. LADD, Judge.

MONDAY, JUNE 2, 1890.

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THE defendant was indicted and convicted for the crime of seduction, and appeals to this court.

No appearance for either party.

BECK, J.—The cause was submitted to us upon a printed abstract. It is not alleged, nor shown, that it contains an abstract of all the record. It contains the certificate of the judge, or the statement in the bill of exceptions, that all the evidence, proceedings and rulings in the case are therein set out, or referred to in the bill of exceptions. No transcript of the record of the case has been filed in this court. We have often ruled that the printing in the abstract the certificate found in the bill of exceptions will not show that the abstract contains all the record set out in the bill of exceptions. There is no agreement that the abstract contains all the record, evidence and proceedings in the case. The case is not in a condition to be reviewed here, as we have not before us the record, or an abstract of all the rulings, proceedings and evidence found therein.

The judgment of the district court must be AFFIRMED.

THE STATE OF IOWA, Appellee, v. JOHNSON *et al.*, Appellants.

Criminal Law: APPEAL.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FRIDAY, OCTOBER 10, 1890.

THE defendants were indicted, tried and convicted of the crime of keeping a saloon nuisance, and they appeal.

No appearance for either party.

ROTHROCK, C. J.—The appeal is presented upon a transcript of the indictment and record entry of a trial by jury and judgment. The transcript does not contain the evidence or the instructions of the court to the jury. We discover no error in the record, and the judgment is AFFIRMED.

THE STATE OF IOWA, Appellee, v. AL. EVANS *et al.*, Appellants.

Appeal: JURISDICTION : PRACTICE.

Appeal from Marshall District Court.—HON. D. R. HINDMAN, Judge.

MONDAY, OCTOBER 6, 1890.

THE defendants, H. W. Gifford and Al. Evans, appear to have been jointly indicted for the crime of nuisance, alleged to have been committed by using a certain building as a place in which to keep and sell intoxicating liquors in violation of law. Evans was granted a separate trial, was convicted, and adjudged to pay a fine of three hundred dollars and costs. The defendant appeals.

John Y. Stone, Attorney General, *W. W. Miller* and *Henderson & Hargrave*, for the State.

J. M. Parker and *J. F. Meeker*, for appellant.

ROBINSON, J.—The abstract does not allege, and there is nothing in the record submitted in this court to show, that an appeal has been taken. It is well settled that, without such a showing, this court cannot determine the case on its merits. It is, therefore, DISMISSED.

THE STATE OF IOWA, Appellee, v. MARGARET STROUP, Appellant.

Appeal : RECORD.

Appeal from Polk District Court.—HON. CHARLES H. BISHOP, Judge.

FRIDAY, OCTOBER 17, 1890.

THE defendant was indicted, tried, convicted and sentenced for the crime of keeping a house of ill-fame, and she appeals.

No appearance for either party.

ROTHROCK, C. J.—The appeal is presented to this court upon an indictment and a record entry of a trial by jury, verdict of guilty and judgment upon the verdict. The record does not set forth the evidence nor the instructions of the court to the jury. An examination of the record as presented discloses no error, and the judgment of the district court will be AFFIRMED.

C. MCKINNIS, Appellant, v. T. J. ESTES *et al.*, Appellees.

Conveyance of Real Estate : MORTGAGE : PAYMENT : EVIDENCE.

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Appeal from Keokuk District Court.—HON. W. R. LEWIS, Judge.

MONDAY, OCTOBER 20, 1890.

ACTION to foreclose a mortgage. Upon a trial on the merits, the plaintiff's petition was dismissed. He now appeals to this court.

Smith & Talley, for appellant.

E. S. Samson, for appellees.

BECK, J.—I. The mortgage was executed to secure a debt of fifty dollars by Mary A. Estes. It covers twelve acres of ground. The mortgagor, who subsequently died, devised the land for life to defendant, J. H. Estes, a son, and directed in her will that, upon his death the property should be sold, and the proceeds divided among her other children and grandchildren. The defendants in their answer allege, that the mortgage was paid by J. H. Estes to plaintiff, the assignee thereof.

II. We think this defense is established by the preponderance of the evidence. The defendant, J. H. Estes, testifies that he conveyed the land to plaintiff in payment of an account held by plaintiff for medical attendance and the satisfaction of the mortgage, which plaintiff agreed to acquire from the mortgagee, and then cancel it. The defendant's evidence is contradicted by plaintiff, who testifies that he was to discharge the bill for medical attendance for the land, and give nothing more. He is not corroborated. Defendant is corroborated by the evidence of a witness who testifies that plaintiff stated to him, soon after the transaction, that he was to pay off the mortgage, and discharge the account for medical attendance in payment for the land. The fact that the consideration named in the deed about equals the amount due on the mortgage also corroborates defendant.

III. Plaintiffs insists that the contract set up by defendant was made on Sunday, and, therefore, cannot be enforced. This position is not sustained by the evidence. Negotiations may have been had on Sunday, but the contract was agreed to and consummated on another day.

It is our opinion that the decree of the district court ought to be AFFIRMED.

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A. W. RESSLER, Appellee, v. JOHN BAXLEY, Administrator, Appellant.

Appeal: ERROR WITHOUT PREJUDICE : EVIDENCE.

Appeal from Grundy District Court.—HON. C. F. COUCH, Judge.

WEDNESDAY, OCTOBER 22, 1890.

THIS is a proceeding in the district court, sitting as a court of probate, for the allowance of a claim against defendant's intestate. The case was tried to a jury, and judgment on the verdict was rendered for plaintiff. The defendant appeals.

Boies, Husted & Boies, for appellant.

Rea & Hayes, for appellee.

BECK, J.—I. The claim against the estate of defendant's intestate, involved in this case, we set out in full, for the reason that questions arise in the case upon certain of its allegations. It is in the following language :

"Estate of Susan Baxley, in account with Mrs. H. L. Snyder, Dr.

"To board, washing, care and attendance, from March 1, 1882, to November 1, 1886, four years and eight months, at ten dollars per month	$560
"To nursing, board and care in last sickness, from November 1, 1886, to February 11, 1887, 103 days, at one dollar per day	103
"To help of husband in last sickness, from January 11 to February 11, 1887, 30 days, at one dollar per day	30
"Total	$693

"STATE OF IOWA, } ss.
"Grundy County }

"I, H. L. Snyder, being first duly sworn, on oath say I am the claimant named in the foregoing statement; that Susan Baxley therein named was, at her death, justly indebted to this claimant in the sum of five hundred and sixty dollars, for board, washing, care and attendance furnished her by this claimant, at her instance and request, and on her special promise to pay claimant therefor, from March 1. 1882, to November 1, 1886, which board, care, etc., was of the reasonable and just value of ten dollars per month; that she was further indebted to this claimant for nursing, care and attendance during her last sickness, furnished at her instance and request, one hundred and three days, to-wit, from the first day of November, 1886, to the eleventh day of February, 1887, which nursing, care and attendance were of the reasonable and just value of one dollar per day, or of the aggregate value of one hundred and three dollars; that she was further indebted to this claimant for the services of the husband of her, the said claimant, furnished at the request of said deceased, in the sum of thirty dollars, for his services from January 11, 1887, to February 11, of the same year, at one dollar per day; that no part of said claim has been paid or in any manner satisfied; and that the whole amount thereof is still justly due and owing this claimant. Verified October 26, 1887, by

"H. L. SNYDER."

An amendment to this petition need not be set out. The answer denies the allegations of the petition, and alleges that the intestate, during the time for which services were charged in plaintiff's claim, was a member of her family. The claim, after its verification, and before it was filed, was assigned to plaintiff.

The court, in the statement of the issues to the jury, and in other instructions, stated plaintiff's claim as being based upon a special promise of the intestate to pay the sum claimed upon the several items. There is no evidence of a special promise to pay the second and third items. Defendant claims that there is a variance between the allegations of the petition and the proof, and that he suffered prejudice from the erroneous direction as to the special promise on the second and third items.

No objection was raised in the court below, based upon the alleged variance. Such objection cannot be first raised in this court. *Iselin v. Griffith*, 62 Iowa, 668; *Singer v. Given*, 61 Iowa, 84; *Lines v. Lines*, 54

Iowa, 600. No possible prejudice could have resulted to defendant in the erroneous statement by the court that the second and third items were based upon a special promise. If it had any effect at all it would lead the jury to look for evidence of a special promise to authorize a finding for plaintiff upon the second and third items. Prejudice would result to plaintiff, and not to defendant. The verdict for plaintiff is in a sum less than the amount claimed in the first item, which is based upon a special promise. The evidence tends to support such promise, and justified the finding of the verdict upon that item alone. We shall presume that the verdict was based upon this item. This is a sufficient answer to more than one of defendant's positions.

II. It is insisted that there is no evidence in the case as to the value of services mentioned in item 3. Let this be admitted for the purpose of the case. As we have seen, the first item alone supports the verdict. We will presume the jury found nothing due plaintiff on the third item.

III. Complaint is made that the jury were not directed to consider the value of services rendered by the intestate to plaintiff. It is sufficient to say that such services are not pleaded as payment or as counterclaim.

IV. The defendant's counsel argue at great length that the evidence fails to support the verdict by showing that there was a special promise, and that services were rendered thereunder. We think differently. At all events, it can be regarded as nothing more than a case of a conflict of evidence, which it was the peculiar province of the jury to solve. The case presents no ground for interference on our part.

V. Defendant, a son of intestate, offered to prove that, after her death, he and his aunt took from her residence, as their property, certain household furniture, used in intestate's family. The evidence was rightly rejected as immaterial. Whether the furniture was or was not the property of the witness and his aunt, or whether they had or had not the right to remove it, the act proposed to be proved had no possible relevance to the issue in the case. These considerations dispose of all questions in the case. AFFIRMED.

THE STATE OF IOWA, Appellee, v. GEORGE KERN, Appellant.

Criminal Law: ASSAULT: APPEAL.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

THURSDAY, OCTOBER 23, 1890.

INDICTMENT for assault with intent to murder. The defendant was convicted on his plea of guilty of the crime of an assault with intent to inflict great bodily injury. From a judgment imposing a fine of

one hundred dollars, and costs, and that the defendant be imprisoned in the county jail for thirty days unless the fine be paid, the defendant appeals.

No appearance for either party.

GRANGER, J.—The only paper before us is a transcript of the proceedings below showing the indictment and proceedings upon which the conviction was had. The record discloses no error in the proceedings, and the judgment is AFFIRMED.

CHARLES DEAN, Appellant, v. W. F. CLARK, Sheriff, *et al.*, Appellees.

Pension Money: PROPERTY PURCHASED THEREWITH EXEMPT FROM EXECUTION.

Appeal from Floyd District Court.—HON. GEORGE W. RUDDICK, Judge.

FRIDAY, OCTOBER 24, 1890.

THIS is an action in equity to set aside a sheriff's sale of certain real estate and cancel the certificate of purchase upon the ground that the property was purchased with money received by the plaintiff as a pension for services as a soldier in the war of the rebellion. There was a demurrer to the petition which was sustained, and the action dismissed. Plaintiff appeals.

Rickel & Crocker, for appellant.

P. W. Burr, for appellees.

ROTHROCK, C. J.—The material question involved in the case is identical with that determined by this court in *Crow v. Brown*, *ante*, p. 844, determined at the present term in which a [majority of the court held that the property was exempt from execution or attachment upon the ground that it was purchased with pension money. Following that case the order sustaining the demurrer and dismissing the cause is REVERSED.

ROBINSON, J., dissenting.

J. J. RUSSELL *et al.*, Appellants, v. W. B. TORBET *et al.*, Appellees.

Homestead: PRACTICE IN SUPREME COURT: ARGUMENT.

Appeal from Louisa District Court.—HON. D. RYAN, Judge.

FRIDAY, OCTOBER 24, 1890.

WILLIAM B. and Nancy P. Torbet are brother and sister, and are defendants in this suit. William B. Torbet was the owner of two pieces of land, one containing eight and one-half acres and the other six and one-half acres. While owning said lands, William B. Torbet became indebted to the plaintiffs, who are now judgment creditors of said Torbet. After the indebtedness arose, and before the judgments were obtained thereon, William B. Torbet transferred the lands in question to his codefendant, Nancy P. Torbet. This action is to set aside the conveyance of the lands, and declare them subject to execution upon the judgments obtained, on the ground that the transfer was collusively fraudulent as to the plaintiffs. The answer denies the fraud, and avers a homestead right as to the eight and a half acre tract in William B. Torbet. The district court found for the plaintiff as to the fraudulent transfer of the property, and for William B. Torbet under his claim of a homestead right, and gave judgment accordingly, from which the plaintiffs appeal.

E. W. Tatlock, for appellants.

No appearance for appellee.

GRANGER, J.—We readily concur in the conclusion of the district court that the transfer of the lands was fraudulent and void. The question of homestead exemption alone remains to be considered. This question, in its legal aspect, is nice and important. The announcement of legal rules, to serve as precedents, is of so much importance that the greatest care should be observed in the performance of the duty. An almost indispensable requisite, as an aid to the court, is a carefully prepared brief and argument. If an appellant neglects to furnish this aid, we assume he has abandoned his appeal or claims in this court, and without other reasons affirm the action of the court below. A like rule has not been applied against an appellee with such neglect, but his case is examined and determined with such care as its importance demands, and our time will admit of. The result, however, is always reached with greater liability to error, and, while a conclusion must be reached and announced, it is done with a conviction of such liability,

and of the necessity of avoiding it as far as practicable. If appellees neglect to aid us, and our conclusions are against them, they cannot justly complain that they are not favored with our reasons, and an elaborate statement of the facts. The homestead claim in this case is based on an occupancy by brother and sister, and under a state of facts new and somewhat peculiar. In view of the record, and the absence of an argument for appellees, we content ourselves with the announcement that, with our examination of the record, we do not find the facts necessary to sustain the averment of a homestead right in William B. Torbet, and that plaintiffs are entitled to a decree subjecting the premises to their judgment. REVERSED.

MASTIN HUNTER, Appellant, v. W. N. BULL *et ux.*, Appellees.

Partnership: ACCOUNTING: EVIDENCE.

Appeal from Dickinson District Court.—HON. GEORGE H. CARR, Judge.

SATURDAY, OCTOBER 25, 1890.

ACTION in equity for an accounting and settlement of an alleged partnership in the distillery business which plaintiff claims existed between him and Angevine Bull. The claim of defendants is that Angevine Bull was not at any time a partner of the plaintiff, and that nothing is due to the plaintiff on account of said distillery business, nor on any other account. There was a full trial on the merits, and a decree dismissing the petition. Plaintiff appeals.

J. W. Corey, for appellant.

A. E. Clark and *R. M. Wright*, for appellees.

ROTHROCK, C. J.—It appears from the evidence that there was at one time a whiskey distillery in operation in Webster county, and that it was owned and the business carried on by a partnership known by the firm-name of Bull & Hunter. The plaintiff claims that Angevine Bull was a partner, and the defendant denies this, and claims that W. A. Bull was the partner. The evidence upon this question is quite voluminous. We have carefully examined the whole record in this court, and reach the conclusion that the averment that Angevine Bull was a member of the partnership is not established. As the question is one purely of fact, we do not think it important to set out the testimony of the witnesses, or give reasons for our conclusions. It may not be improper to say further that, even if it should be held that a partnership existed between the plaintiff and Angevine Bull, a fair statement of the affairs of the partnership would not show that plaintiff is entitled to recover. AFFIRMED.

JOHN HARTY v. MARCUS KAVANAGH, JR., Judge.

Certiorari: INJUNCTION: JURISDICTION.

Certiorari to Polk District Court.

SATURDAY, OCTOBER 25, 1890.

THE plaintiff was under injunction from the district court of Polk county to refrain from selling or keeping for sale intoxicating liquors. An information was filed accusing him of violating the injunction; and upon the hearing he was adjudged in contempt, and ordered to pay a fine of five hundred dollars, and to stand committed to the jail of Polk county until such fine was paid, as by law provided. This proceeding is to test the legality of the proceeding by which the fine was imposed.

No appearance for either party.

GRANGER, J.—The petition for the writ of *certiorari* recites that the proceeding upon which the injunction issued is void, because of no notice to or appearance by the plaintiff in the proceeding. No effort is made here to show the facts as claimed, and the return of the defendant in obedience to the writ is an affirmative showing of jurisdiction. The writ of *certiorari* is DISMISSED.

J. H. PLANK *et al.*, Appellees, v. REINHART *et al.*, Appellants.

Boundary Lines: ADVERSE POSSESSION: APPOINTMENT OF COMMISSIONER.

Appeal from Howard District Court.—HON. S. E. FELLOWS, Judge.

MONDAY, OCTOBER 27, 1890.

THIS is a proceeding under chapter 8 of the Acts of the Fifteenth General Assembly to establish disputed lines and corners of certain lands. The plaintiff made application for the appointment of a commission to make a survey, and establish the disputed boundaries. The defendant resisted the appointment of the commission. The appointment was made, and the defendant Reinhart appeals.

L. Bullis and *F. Sayre*, for appellants.

H. T. Reed, for appellees.

ROTHROCK, C. J.—The application appears to us to be in due form. The defendant Reinhart filed certain objections and affidavits from which it appears that he has held adverse possession of the land up to the line claimed by him for a sufficient time to acquire title by prescription. If we understand the case the plaintiffs claim that there has been no adverse possession. The order appointing the commissioner provided that he should "make a survey, and take the testimony of witnesses who may be able to identify any original government corner or witness thereto, government line or tree, or other noted object, or any other legally established corners that have been recognized as such by the adjoining proprietors for more than ten years, and that if any improvements have been made in reference to any such line, and return such evidence with a plat of said survey to the court." It appears to us that there was no abuse of discretion in making this order. The defendant's rights are fully protected thereby. If it should appear that defendant's claim of title to the land by adverse possession is sustained by the evidence, that would be an end of the investigation. *Davis v. Curtis*, 68 Iowa, 66. AFFIRMED.

SIBLEY LOANING COMPANY, Appellee, v. D. L. MCCAUSLAND *et al.*, Appellants.

Appeal: CERTIFICATE OF TRIAL JUDGE.

Appeal from Osceola District Court.—HON. C. H. LEWIS, Judge.

TUESDAY, OCTOBER 28, 1890.

D. D. McCallum, for appellants.

O. J. Clark, for appellee.

GIVEN, J.—The pleadings show that appellee asks to recover the possession or value of a certain gray mare, alleged to be of the value of seventy-five dollars, by virtue of a certain chattel mortgage. The petition shows the execution by one Irwin of several promissory notes at different times, and chattel mortgages upon the mare in question to secure the same, and that said notes and mortgages were for the same debt and renewals of the one originally given. The answer shows

that a mortgage was executed to the defendant upon the same property prior to the one under which plaintiff claims, but subsequent to the one of which he alleges it was a renewal. Defendant claims that the latter mortgage was not a renewal, but to secure a new and different debt. The contention is as to the priority of these mortgages. The amount in controversy, as shown by the pleadings, does not exceed one hundred dollars, and the case does not involve any interest in real property, and is, therefore, not appealable except upon certificate of the trial judge. Code, sec. 3173. No certificate having been granted by the trial judge, the appeal must be dismissed. DISMISSED.

THE STATE OF IOWA, Appellee, v. LOU BRISSOU, Appellant.

Nuisance: JUDGMENT: APPEAL.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

WEDNESDAY, OCTOBER 29, 1890.

ROBINSON, J.—The defendant, Lou Brissou, was convicted of the crime of nuisance, and from the judgment of the district court requiring him to pay a fine of five hundred dollars and costs, and to be imprisoned in default of payment, he appeals. The cause is submitted in this court on a transcript of the indictment, record of judgment, and notice of appeal. We find no error in the record. AFFIRMED.

THE STATE OF IOWA, Appellee, v. LOU FOLEY, Appellant.

Appeal in Criminal Cases: PRACTICE.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

WEDNESDAY, OCTOBER 29, 1890.

PER CURIAM.—The defendant was convicted of the crime of nuisance, and, his motion for new trial being overruled, judgment was pronounced upon the verdict, from which the defendant appeals. The case is submitted upon partial transcript, without briefs or arguments. The motion for new trial is not set out, and we cannot determine whether the court erred in its ruling or not. We discover no error in the record. The judgment of the district court is AFFIRMED.

THE STATE OF IOWA, Appellee, v. O. S. PFLEAJOR, Appellant.

THE STATE OF IOWA, Appellee, v. J. N. CALDWELL, Appellant.

Intoxicating Liquors: INTERSTATE COMMERCE: CONSTITUTIONALITY OF ACTS.

Appeals from Polk District Court.

WEDNESDAY, OCTOBER 29, 1890.

THE defendants in each of the above entitled causes were tried and convicted upon a charge of illegally carrying and transporting intoxicating liquors, and they appeal.

Cole, McVey & Clark, for appellants.

John Y. Stone, Attorney General, for the State.

PER CURIAM.—These causes involve the identical questions determined by the supreme court of the United States in the case of *Leisey v. Hardin*, 19 Sup. Ct. Rep. 681. Following that case, the judgments of the district court must be REVERSED.

THE STATE OF IOWA, Appellee, v. GEO. J. HUGHLAN, Appellant.

Appeal: NOTICE: PRACTICE.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

WEDNESDAY, OCTOBER 29, 1890.

ROBINSON, J.—Defendant appears to have been convicted of the crime of owning and keeping intoxicating liquors for sale in violation of law. The case is submitted in this court on a partial transcript of the record. A paper which is alleged to be a copy of the notice of appeal is set out in the transcript, but it is not shown that any notice of appeal was ever served. The cause is, therefore, DISMISSED.

THE STATE OF IOWA, Appellee, v. JACOB BRENDLE, Appellant.

Appeal: TRANSCRIPT: REVIEW.

Appeal from Polk District Court.

WEDNESDAY, OCTOBER 29, 1890.

PER CURIAM.—On appeal to the district court, the defendant was convicted of the crime of selling intoxicating liquors in violation of law. His motion for new trial on the grounds that the verdict was contrary to the evidence, and that the court erred in admitting and refusing evidence, and in the instructions given, was overruled, and judgment entered upon the verdict. Defendant appeals.

The case is submitted upon a partial transcript that does not include the evidence or the instructions, and without briefs or arguments. Without the evidence and instructions before us, we cannot determine whether the court erred in overruling the defendant's motion for new trial. We do not discover any error in the record, and the judgment of the district court is AFFIRMED.

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1. *Unmarried person.* An unmarried person may be guilty of the crime of adultery, and punished therefor under section 4008 of the Code. *State v. Mahan*, 121.

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ACTS OF AGENT BINDING ON PRINCIPAL.

1. *Within scope of apparent authority—presumption.* The possession of a bill of lading by the husband of the shipper named therein, and its exhibition by him to the carrier that issued the same at the time of giving orders in regard to the reshipment of the goods therein described, warrants the presumption that the husband in giving such orders is acting as the agent of the wife, and the carrier will be entitled to act thereon. *Furman v. C., R. I. & P. Ry. Co.*, 540.

AGENCY. ACTS OF AGENT BINDING ON PRINCIPAL. *Continued.*

2. *Waiver of conditions in contract.* Where the agent of a fire insurance company, at the time of accepting an application for insurance has knowledge of the existence of an amount of insurance on the property to be insured in excess of that allowed under a condition in the policy issued on such application, the company will be presumed to have waived such condition; and like knowledge on the part of the insured will not prevent his recovery under such policy. *Hagan v. Merchants', etc., Ins. Co.*, 321.

3. *Beyond the scope of authority—ratification—estoppel.* An agent engaged in the sale of agricultural implements was required, under contract with his principal, to make all notes taken in the course of the business of the agency payable to the order of the principal, and on blanks furnished by them. A number of notes so made were indorsed by the agent in the name of the principal, and sold to the defendant for less than their face, and a considerable portion of the money received thereon was sent by the agent to the principal, who, without knowledge of the facts, credited the amount on an account against the agent for goods sold. At the time of the purchase of the notes the defendant knew that the agent was exceeding his authority, and that a portion of the money paid thereon was to be sent to the principal. With knowledge of the above facts, with the exception of the form of the indorsement, the principal commenced an action of replevin to recover possession of the notes. *Held*, that the principal was not entitled to the notes without surrendering the money received thereon, and that by electing to retain the fruits of the sale the principal ratified the unauthorized act of the agent, and was bound by the terms of the agent's agreement. *Held*, further, that in such action the principal could not be heard to say that his ratification of said sale was made in ignorance of material facts, which inquiry would have revealed. *Deering v. Grundy County Nat. Bank*, 222.

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AGENCY. SALES ON COMMISSION. *Continued.*

equal to the amount to be paid the defendant, but was to have time for the payment of so much of the purchase money as was represented in the commission to be paid the plaintiff. *Held*, that the agreement to give time for payment to the extent of plaintiff's commission was not out of accord with the contract of employment to sell, and that the defendant having disabled himself from making a conveyance of the property by a prior sale, the plaintiff was entitled to recover of him the commission he would have realized had the sale been completed. *Van Gorder v. Sherman*, 403.

LIABILITY OF AGENT.

5. *For unlawful acts committed in course of employment.* An agent who solicits orders for intoxicating liquors, subject to the approval of his principal, is subject to prosecution for the unlawful sale of such liquors, though his principal holds a permit to sell under the law. *State v. Kriechbaum*, 633.

6. *For unlawful acts committed in course of employment.* One charged with the unlawful seizure and conversion of personal property cannot escape liability therefor upon the ground that the seizure and conversion were made as by him simply as the agent of another. *Warder-Bushnell & G. Co. v. Harris*, 153.

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On the question of alibi the court was asked to instruct as follows: "You should indulge no prejudice against an *alibi* as a defense, for the reason that, if it is clearly established by intelligent and reliable witnesses, it is a legal and complete defense." *Held* that it was properly refused, because, *first*, it was not necessary to give the implied warning, and, *second*, it is not necessary to acquittal that an *alibi* be clearly established,—a preponderance of the evidence being sufficient. *State v. Sipult*, 40.

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APPEAL.

RIGHT OF.

1. *Performance of decree.* The decree rendered herein provided for the transfer of certain real and personal property by the defendant to the plaintiff. Upon the suggestion of the court, the defendant surrendered possession of the property in question, pending proceedings on appeal, to the plaintiff, for the purpose of reducing the amount of the *supersedeas* bond. *Held*, that there was not such a performance of the decree as to prevent an appeal. *Sample v. Collins*, 23.

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2. *Waiver—recognition of decree.* Acts of a party pending litigation in recognition of rights subsequently determined by a decree of court therein, but previously abandoned, will not operate as a waiver of the right of appeal from such decree. *Smith v. Gorrell*, 218.

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

RESERVATIONS BY ASSIGNOR.

1. *Of exempt property not invalid.* A provision in a general assignment for the benefit of creditors reserving to the assignor property exempt from execution will not render the assignment invalid. *Bradley v. Bischel*, 80.

BY COPARTNERSHIP.

2. *Individual creditors.* A general assignment by a copartnership for the benefit of the creditors of the firm, without provision for the creditors of the individual partners, is valid. *Id.*

ASSIGNMENT FOR BENEFIT OF CREDITORS. *Continued.*

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3. *Effect of.* The belief of an insolvent in the execution of a general assignment, that he will thereby be absolved from all further obligation to his creditors, will not affect the validity of the deed if made according to law. *Id.*

ASSENT OF CREDITORS.

4. *Inconsistent remedies—election.* A creditor of an insolvent is not estopped from asserting his claim against the fund in the hands of such insolvent's assignee, under a general assignment, because of the commencement of an action by one liable as surety on such claim, attacking the validity of such assignment, and which was subsequently dismissed. *In re Assignment of Hobson*, 392.

PREFERRED CLAIMS.

5. *Not waived by filing with assignee.* The filing of proof of a claim preferred by law with the assignee of an insolvent estate under a general assignment for the benefit of creditors will not operate as a waiver of such preference, and compel such creditor to share *pro rata* with the rest of the creditors. *Nurse v. Satterlee*, 491.

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6. *A creditor of an insolvent* has not, as against a surety upon an obligation held by another creditor of the same debtor, such a superior equity in the fund representing such insolvent's estate, as to entitle him to compel the creditor, whose claim is so secured, to resort to the surety for payment, before seeking satisfaction out of the common fund. *In re Assignment of Hobson*, 392.

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7. *Dishonesty of assignee—effect.* Carelessness or dishonesty in the disposition of property under a general assignment on the part of those intrusted with the execution of the trust will not invalidate the deed of assignment. *Bradley v. Bischel*, 80.

ATTACHMENT.

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1. *Competency of affiant need not be shown.* The provision of section 2672 of the Code, requiring that affidavits in verification of pleadings show the competency of the affiant to make the verification, are not applicable to affidavits made under section 2951 of the Code as the basis for the issuance of writs of attachment. *Sioux Val. State Bank v. Kellog*, 124.

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2. *Where goods of debtor are mingled with another's.* The plaintiff having mingled the goods in question with goods belonging to her husband, but afterwards transferred to her, *held*, that, before the officer serving the writ of attachment could escape liability for a levy upon the latter goods, he must show that he made a reasonable effort to distinguish them and separate them, and was unable to do so, or that, from the nature of the mixture, they of necessity could not be separated. *Allen v. Kirk*, 658.

3. *Invalid without notice to defendant.* The failure of an officer executing a writ of attachment to give notice of the levy thereunder to the attachment defendant renders the levy invalid, notwithstanding an entry thereof in the incumbrance book. *Sioux Val. State Bank v. Kellog*, 124.

DAMAGES.

4. *Levy fatally defective.* Where the levy of a writ of attachment is fatally defective no damages are recoverable for the wrongful suing out of such writ, and, upon disclosure of such fact, evidence introduced under issues joined on the attachment defendant's counter-claim for such damages should be withdrawn from the jury. *Id.*

5. *Perishable property—evidence.* In an action for the wrongful suing out of an attachment levied upon a stock of merchandise, which was thereupon removed from the storeroom where it had been kept, evidence of the value of the stock, and that a portion thereof was of a perishable nature, and of the extent to which the same was damaged, is competent. *Jamison v. Weaver*, 212.

6. *Measure of.* In an action for the wrongful suing out of an attachment against property used only for the purposes of sale the owner is not entitled to recover, as damages, interest on the value of such property from the time of seizure, without a showing of any loss merely from the failure to have the property on hand. *Fullerton Lumber Co. v. Spencer*, 549.

7. *Action on bond—attorney fees.* The defendant recovered judgment against the plaintiff for damages upon an attachment bond, and for court costs, but through oversight made no application for the taxation of attorney fees. After the judgment and cost had been paid, a motion for attorney fees was filed. *Held*, that the application came too late. *Solomon v. McLennan*, 406.

8. *Replevin of property attached.* The provisions of section 3019 of the Code of 1873 have no application to actions to recover the possession of specific articles of personal property held by a sheriff under a writ of attachment. *Linden v. Green*, 365.

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ATTORNEY.

MISCONDUCT OF.

1. *In argument to jury—record.* The use of improper language by counsel in argument to a jury will not constitute ground for the reversal of the judgment of the trial court on appeal when no objection was taken thereto in the court below, nor any instruction asked correcting the error. *Blair v. Madison County*, 313.

2. *In argument to jury—criminal cause—record.* A judgment in a criminal cause will not be reversed on account of improper remarks alleged to have been made by counsel for the state in the closing argument to the jury, when there is a marked conflict in the record upon the question whether such remarks were made, and it does not appear that any objection was made thereto until after the verdict was rendered. *State v. Shreves*, 615.

FEES.

3. *In suit on attachment bond.* The defendant recovered judgment against the plaintiff for damages upon an attachment bond, and for court costs, but through oversight made no application for the taxation of attorney fees. After the judgment and costs had been paid, a motion for attorney fees was filed. *Held*, that the application came too late. *Solomon v. McLennan*, 406.

EMPLOYMENT TO ASSIST IN CRIMINAL PROSECUTION.

4. *The employment of counsel* by a prosecuting witness or party complaining, with the approval of the court and county attorney, to assist in the prosecution of a criminal cause, is not prohibited by Acts of the Twenty-first General Assembly, chapter 73, section 4. *State v. Shreves*, 615.

ATTORNEY AND CLIENT.

CONTRACTS OF ATTORNEY BINDING ON CLIENT.

1. *Evidence.* An attorney may bind his client by an agreement with opposing counsel for the continuance of a cause from term to term, but no evidence of such an agreement is competent as against a party denying the same, except the statement of his attorney, or the attorney's written agreement duly signed and filed with the clerk of the court or an entry thereof upon the records of the court. But such agreement may be legitimately drawn from the statements of an affidavit of a former attorney for the party against whom the agreement is sought to be enforced. *Council Bluffs Loan & Trust Co. v. Jennings*, 470.

NEGLIGENCE OF ATTORNEY.

2. *Liability—damages.* The employment of an attorney to appeal and prepare a case for trial, to prepare an abstract and do all things necessary to present said cause to the supreme court,

ATTORNEY AND CLIENT.

NEGLIGENCE OF ATTORNEY. *Continued.*

includes all that an attorney can do in the direction of the appeal, and to prosecute the same to a final decision in that court; and if, without requesting money of the client for prosecuting the appeal, he fail to do anything in the cause further than prepare and serve a notice of appeal, and direct his client to procure a bond, and the cause is affirmed in the supreme court on motion of the appellee therein, and judgment is rendered against the client for costs, because of the negligence of the attorney to prosecute said appeal, and he deceives his client by representations that he knows what to do, and is attending to said appeal, the attorney will be liable in damages to the client for the amount of the judgment rendered against him, with interest. *Jamison v. Weaver*, 212.

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BANKS AND BANKING.

AGENCY.

Money due on collections. The plaintiff deposited with a bank at D. for collection a foreign letter of credit, receiving a receipt therefor. The letter was forwarded by the bank for payment, and, a draft being subsequently received in payment thereof, it indorsed the same over to a bank at C. to be placed to the former's credit in its exchange account, and entered upon its journal the amount due under the letter of credit to the credit of plaintiff, and made a like entry on the credit side of the bank's ledger. Subsequently, and before payment of the letter of credit to plaintiff, the bank at D. made a general assignment for the benefit of creditors; the bank at C. having at the time a sum much greater than the draft above referred to to the credit of the bank at D. *Held*, that the relation between plaintiff and the bank at D. was not that of debtor and creditor, but of principal and agent; and that the money collected was in the nature of a trust fund, to which the plaintiff was entitled as against the assignee and creditors of the bank of D. *Nurse v. Satterlee*, 491.

BILLS AND NOTES.

SIGNATURE IN BLANK.

1. *Alteration—innocent purchaser.* One who signs a promissory note in blank cannot be heard to complain, as against a *bona fide* purchaser thereof before maturity, that the amount afterwards inserted therein was not according to the agreement between himself and the payee. *Frank v. Hollands*, 164.

BILLS AND NOTES. *Continued.*

ALTERATION OF.

2. *Innocent purchaser—evidence.* The presumption that the holder of a bill of exchange, acquired before maturity, is a purchaser for value, and without notice of defenses, will be rebutted by affirmative proof of a material alteration thereof since its acceptance by the drawee, and will put upon the holder the burden of showing that he purchased the same in good faith, and without notice of the alteration. *Smith v. Eals*, 235.

INDORSEMENT.

3. *By agent without authority—ratification.* An agent engaged in the sale of agricultural implements was required, under contract with his principal, to make all notes taken in the course of the business of the agency payable to the order of the principal, and on blanks furnished by them. A number of notes so made were indorsed by the agent in the name of the principal, and sold to the defendant for less than their face, and a considerable portion of the money received thereon was sent by the agent to the principal who, without knowledge of the facts, credited the amount on an account against the agent for goods sold. At the time of the purchase of the notes the defendant knew that the agent was exceeding his authority, and that a portion of the money paid thereon was to be sent to the principal. With knowledge of the above facts, with the exception of the form of the indorsement, the principal commenced an action of replevin to recover possession of the notes. *Held*, that the principal was not entitled to the notes without surrendering the money received thereon, and that by electing to retain the fruits of the sale the principal ratified the unauthorized act of the agent, and was bound by the terms of the agent's agreement. *Held*, further, that in such action the principal could not be heard to say that his ratification of said sale was made in ignorance of material facts, which inquiry would have revealed. *Deering v. Grundy County Nat. Bank*, 222.

4. *Rights of indorser—judgment—payment by indorser.* Judgment having been rendered against the maker and indorser of a promissory note, money from the indorser sufficient to satisfy the same was placed in the hands of W. under an agreement that he should obtain an assignment of the judgment to himself, and then assign the same to the plaintiff. W. obtained an assignment of the judgment, but, instead of assigning the same to plaintiff, he assigned to one N., who received payment of the judgment from the maker of the note, and satisfied the same of record. At the time of the assignment to N., he and the maker of the note knew that W. had no interest in the judgment, and that he was under obligation to

BILLS AND NOTES. INDORSEMENT. *Continued.*

assign the same to the plaintiff. *Held*, that the plaintiff having received from the indorser an assignment of his interest in the judgment, was entitled to recover of the maker the amount paid by the indorser, but not exceeding the sum necessary to satisfy the judgment. *Johnson v. Webster*, 581.

REPLEVIN FOR VOID BILL.

5. *The acceptor* of a bill of exchange, that has become void in the hands of the holder thereof, may maintain replevin for the possession of the same. *Smith v. Eals*, 235.

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1. *Commissioner's report—appeal.* A proceeding to establish a disputed corner and boundary line under Laws, 1874, chapter 8, is a special proceeding wherein the commissioner's report has the force of the verdict of a jury, and is reviewable on appeal only on errors assigned. *Yocum v. Haskins*, 436.

COMMISSIONER'S REPORT.

2. *Evidence.* Where, in such proceeding, the dispute is as to which of two points is the established corner, and one point is where such corners are usually established, and is such as to give to each owner the quantity of land purchased, and the other is remote, and gives to some more and to others less than the quantity of land purchased, the former is to be regarded as the true corner, rather than the latter; and following this rule, *held*, that the commissioner's report in this case is supported by a preponderance of the evidence. *Id.*

3. *Objections to—practice.* Upon the filing of the commissioner's report herein with the district court, the plaintiff filed objections thereto and moved that judgment be rendered, fixing the corner at a point different from that found by the commissioner. This motion was sustained, and the court rendered judgment accordingly, dividing costs equally between the parties joining in the contention. *Held*, that this action of the court, except as to costs, was erroneous; that the commissioner's report should have been approved, modified or amended, and judgment rendered accordingly, or the same rejected, and the report re-referred to the commissioner for correction, or the commission set aside, and a new commissioner appointed. *Id.*

BURGLARY.

WHAT CONSTITUTES A "BREAKING."

1. *Lifting a latch.* Lifting the latch of a door to a building, and entering therein, is a "breaking" into such building within the meaning of the statute against burglary. *State v. O'Brien*, 93.

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2. *An indictment* which charges one with burglariously breaking and entering "a certain store of one W. W. Doolittle," sufficiently alleges the ownership of said premises. *Id.*

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3. *Testimony of accused—cross-examination.* A defendant on trial for the crime of burglary, who has testified on direct examination to having seen a stranger come out of the premises entered as he went in, may be required on cross-examination to state who remained on the premises in question. *Id.*

4. *The defendants*, three in number, were jointly indicted for burglary of goods in a storeroom. The person in charge of the store testified that the door of the store was shut and latched, and that defendants entered by raising the latch; while the defendants all testified that the door was open when they entered. *Held*, that the finding of the jury against the defendants cannot be said to be without justification. *Id.*

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1. *Common-law rule—rebates.* The plaintiffs, who were shippers of cattle, were charged by the defendant from three to ten dollars per carload of cattle shipped over its road in excess of the charges made to other shippers over its road for the same service

COMMON CARRIER. FREIGHT RATES. *Continued.*

and under the same conditions, the difference being allowed the favored shippers in the shape of a secret rebate, which fact was concealed from the plaintiffs. *Held*, that at common law a common carrier is entitled to a reasonable charge only for the service rendered ; that its discriminations in favor of other shippers were evidence that the charges demanded of plaintiffs were unreasonable ; and that the plaintiffs were entitled to recover the difference between the charges paid by them and the more favorable rates granted to other shippers. *Cook et al. v. C., R. I. & P. Ry. Co.*, 551.

BILL OF LADING.

2. *Possession of warrants presumption of agency.* The possession of a bill of lading by the husband of the shipper named therein, and its exhibition by him to the carrier that issued the same at the time of giving orders in regard to the reshipment of the goods therein described, warrants the presumption that the husband in giving such orders is acting as the agent of the wife, and the carrier will be entitled to act thereon. *Furman v. C., R. I. & P. Ry. Co.*, 540.

LIABILITY FOR NON-DELIVERY OF GOODS.

3. *Attachment of property—notice to shipper—release of carrier.* The plaintiff shipped a quantity of household goods from Chicago by way of defendant's railway to Atchison, Kansas. In an action to recover the value of said goods for the failure of the defendant to transport them to their destination, the jury returned a special verdict, finding that subsequent to the shipment the plaintiff 's husband called at defendant's office in Muscatine, Iowa, with the bill of lading in his possession, to order the delivery of said goods at Muscatine instead of at Atchison, and was then notified by defendant that the goods had been taken from its possession in Chicago under a writ of attachment ; that this notice to plaintiff 's husband was given in time to assert plaintiff 's right and title to the goods before the same were sold under the attachment proceedings. *Held*, that defendant's motion for judgment upon the special findings, notwithstanding the general verdict, ought to have been sustained. *Id*

DUTY TO EMPLOYES.

4. *Safety of appliances—negligence—personal injury.* Where the car-coupler employed by a railroad company on one of its freight cars was one not commonly used, and was not reasonably safe when used with such cars, and one employed as a " wiper," having no previous knowledge that such coupler was in use, nor of its dangerous character, while attempting to make a coupling with such car was injured, *held* that the " wiper " had a right to

COMMON CARRIER. DUTY TO EMPLOYES. *Continued.*

believe that the cars and appliances used by the company were reasonably safe, and that the company was negligent in not informing him of the dangers of the service and of the methods of avoiding it. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

DUTY TO PUBLIC.

5. *Crossing—license—personal injury.* Conduct on the part of a railroad company amounting to an invitation or license to *cross* its tracks at a point where there is no street or public highway is not to be construed as a license to *walk along* its tracks, and one so walking cannot claim of the railroad company the duty of exercising ordinary care in the movement of its trains to prevent his injury, even though said tracks have been habitually so used by the public, and without disapproval on the part of the company. *Richards v. C., R. I. & P. Ry. Co.*, 426.

6. *Street crossing—flagman.* The knowledge of a traveler over a railroad at a street crossing that no flagman is stationed there at such hour, and his dependence, for that reason, upon his own sight and hearing to discover the approach of trains, will not excuse the railroad company for its negligence in not keeping a flagman stationed at the crossing at such hour. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267.

7. *Crossing—flagman.* Whether the failure of a railway company to keep a flagman on duty at a street crossing in a city, over which its road passes, at a given hour in the day, constitutes negligence, is a question to be determined from a consideration of all the circumstances of the particular case. *Id.*

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CONSPIRACY.

EVIDENCE.

1. *Declarations of coconspirators.* It is not the rule that when a conspiracy is formed all admissions, acts and declarations of a coconspirator may be put in evidence against the others, but only such as are done or made in furtherance of their plans. *State v. McGee*, 17.

2. *An instruction* with reference to each conspirator being bound by the acts of the other, further stated, that the jury must find that the conspiracy existed as alleged, that the plaintiff was a party thereto, and that the acts and declarations of the conspirators must have been in furtherance of a common design, on the part of plaintiff and the other alleged conspirators. to defraud the creditors of plaintiff's vendor. *Held*, not subject to the objection that it bound the plaintiff by acts and declarations made only after she joined the conspiracy. *Allen v. Kirk*, 658.

CONSPIRACY. EVIDENCE. *Continued.*

3. *Declarations of coconspirators.* The declarations of a vendor, made under oath, in relation to transactions between him and his vendee, but in the absence of the latter, and after the consummation of a sale of personal property, are not admissible in evidence, as against the vendee, upon the issue of an alleged conspiracy between the parties. *Id.*

See Murder, 6.

CONSTITUTIONAL LAW.

EX POST FACTO LAWS.

1. *Acts pertaining to remedy—validity.* At the time defendant's crime was committed the law in force entitled defendants in such cases to twenty peremptory challenges to the jury, and the state to but ten. Subsequently, the law was amended by the legislature so as to give the defendant but ten such challenges, the same as given to the state; which law did not go into effect until after the commencement of the prosecution herein. *Held*, that the amendment affected no vested right of the defendant, but pertained merely to the remedy, and was valid. *State v. Shreves*, 615.

TITLE TO LEGISLATIVE ACTS.

2. *Compound lard.* The subject of a legislative act prohibiting the sale of any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, unless it be labeled "compound lard," and designate the name and proportion of each ingredient contained therein, is sufficiently described in the title, "An act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof." *State v. Snow*, 642.

POLICE POWER.

3. *Regulation of trade—fourteenth amendment.* Such an act as above described is within the police powers of the state, and is not in violation of the constitution of Iowa, article 1, section 9, nor of the constitution of the United States, fourteenth amendment, article 1. *Id.*

CONTINUANCE.

GROUNDS FOR.

1. *Sickness of counsel.* The defendant was indicted for the crime of murder on November 27, 1889, and on the same day was arraigned and pleaded not guilty. January 28, 1890, that being the second day of the January term, he filed a motion for a continuance upon the ground of the absence of witnesses and the sickness of his attorneys. The state showed by counter-affidavits that all of the witnesses were able to attend court, and that one of

CONTINUANCE. GROUNDS FOR. *Continued.*

defendant's attorneys was able to attend court, and that the other had only recently been employed. The court overruled defendant's motion, but authorized him to make a showing as to the condition of his attorneys and witnesses, February 4. No sufficient showing was made, however, and upon the trial one of the attorneys, alleged to be sick, with the assistance of another attorney, appeared and conducted the case, and all of the witnesses appeared and testified except two, one of whom had removed from the state, but no diligence to obtain his testimony was shown. *Held*, that the motion for a continuance was properly overruled. *State v. Murdy*, 603.

COUNTER-AFFIDAVITS.

2. *May controvert facts on which motion is based.* Where a motion for a continuance is filed by the defendant in a criminal cause, the state may file counter-affidavits controverting the facts on which defendant's motion is based other than the averments as to what absent witnesses would testify to, if present. *Id.*

CONTRACT.

CONSIDERATION.

1. *Subscription to stock in mining corporation.* The defendant, being the owner of a silver mine in Arizona, prospected the same to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet, resulting in a find of a small vein of silver ore. He thereupon organized a stock company in Iowa to operate said mine, with a capital stock of five hundred thousand dollars. In consideration of seventy thousand dollars' worth of such stock the plaintiff agreed to pay defendant seventeen hundred and fifty dollars, or convey to him certain real estate. *Held*, that the contract was not without consideration, nor was the consideration so inadequate as to constitute a badge of fraud. *Coles v. Kennedy*, 360.

EVIDENCE.

2. *Of agreement to convey real and personal property.* The plaintiffs, who are husband and wife, brought this action against the executor of the will of the husband's stepmother to secure the performance of an alleged parol agreement, made by the stepmother, during her lifetime, to convey to them certain real and personal property in consideration of care and attention to be given her person and estate. The evidence showed that such care and attention was given the deceased until her death, but it amounted to little more than what might reasonably be expected from plaintiffs in view of the relationship of the parties. The value of the property in question was above ten thousands of dollars, and

there was no evidence of any express agreement for its conveyance. The deceased, however, had been infirm for several years prior to her death, during a part of the time being incapable of taking care of herself, and a number of times gave expression to her gratitude to plaintiffs for remaining with and caring for her and of her intention to leave said property to them for a home upon her decease. *Held*, that the evidence failed to show an agreement to convey. [BECK, J., *dissenting*.] *Sample v. Collins*, 23.

CONDITIONS.

3. *Performance—sale of real estate.* Under an agreement with defendant, giving him the exclusive right to sell certain described real estate for one year for cash, and providing that he should have as commission any sum realized over and above an amount stated, the plaintiff within the time required found a purchaser who was able, ready and willing to buy said real estate at a price considerably in excess of the amount stated, and who agreed to pay in cash a sum equal to the amount to be paid the defendant, but was to have time for the payment of so much of the purchase money as was represented in the commission to be paid the plaintiff. *Held*, that the agreement to give time for payment to the extent of plaintiff's commission was not out of accord with the contract of employment to sell, and that the defendant having disabled himself from making a conveyance of the property by a prior sale, the plaintiff was entitled to recover of him the commission he would have realized had the sale been completed. *Van Gorder v. Sherman*, 403.

4. *Performance—action.* A contract for grading the road of a railway company provided that eighty-five per cent. of the price therefor should be paid in monthly installments as the work progressed, and the balance within fifty days after the completion of the work, and upon the production of a certificate of an engineer therein named as to the quantity of work done, to be determined by measurements taken after the completion. Measurements of the work done were made by an assistant engineer each month, but these were for the purpose merely of estimating the amount payable under the provision for payment of the monthly installments. *Held*, that the provision of the contract requiring a certificate from the engineer as to the amount of work done before final settlement was valid, that the measurements taken monthly were not a compliance with such provision, and that plaintiffs were not entitled to maintain an action for the balance alleged to be due them under such contract until fifty days after the production of the certificate of the engineer therein named, or a showing of sufficient excuse for not producing the same. *McNamara et al. v. Harrison et al.*, 486.

CONTRACT. CONDITIONS. *Continued.*

5. *Waiver of by agent—inoperative provisions.* A provision in an agreement in writing that "no one has any authority to add to, abridge or change it in any manner" is inoperative, in that it precludes any amendment of the contract by the parties themselves, and a waiver of any of the conditions of such contract by one of the parties thereto, or by a duly authorized agent, will be enforced notwithstanding such provision. *Osborne & Co. v. Backer*, 375.

CONSTRUCTION.

6. *Contract for sale of lands—description.* The plaintiffs' grantor having purchased three-fourths of the interest of Kossuth county in its swamp lands and indemnity scrip, and C. being the owner of the remaining one-fourth, except such portion as he had become divested of by conveyance to P., said grantor of plaintiffs entered into a written contract with C. for the purchase of the lands owned by him, which being incapable of description by numbers, or by metes and bounds, was described as, "all of said C.'s —— interest," and again, as "a conveyance of all remaining interests of whatever character which the said C. now has or hereafter may acquire in any of said lands or claims for indemnity." At the date of said contract the conveyance from C. to P. had not been recorded, but the evidence tended to show that one of the agents of the grantee named in said contract, who was negotiating for said purchase, had actual knowledge of the deed to P. *Held*, that said contract was not ambiguous, and that it conveyed only the interest C. had in said lands at the date thereof, or might thereafter acquire, and did not include the lands previously conveyed by him to P. *Callanan v. Merrill*, 73.

See Insurance (Fire), 3, 4.

PERFORMANCE. See Agency, 1, 4.

VALIDITY.

7. *Limiting venue of actions.* A condition in a contract limiting the venue or place where action may be brought thereon is invalid. *Matt v. Mutual Aid Ass'n of Ottumwa*, 135.

RESCISSION.

8. *Because of non-performance—care and maintenance as consideration.* The plaintiff, a woman of sixty-two years of age, and in infirm health, conveyed to defendant, her son, by quitclaim deed, eighty-five acres of land, valued at six thousand dollars, in consideration of "future maintenance and care." The defendant moved upon the land, and made certain improvements and repairs, which were largely paid for out of the proceeds of the farm. After four or five months the parties disagreed, and,

CONTRACT. RESCISSION. *Continued.*

upon plaintiff's direction and demand, the defendant removed from the premises. *Held*, that the contract was to be construed as binding the defendant to give to plaintiff such care and attention as her age and infirmities demanded for her comfort, which included not only physical comforts, but gentleness, indulgence and friendly words of encouragement; and that defendant, having failed to care for the plaintiff in accord with this requirement, had violated his contract as expressed in said deed; and, by his withdrawal from the premises, having shown his determination to continue in its violation, a decree setting aside the conveyance was proper. *Patterson v. Patterson*, 626.

9. *Upon ground of fraud.* The plaintiff agreed to sell to defendant certain specific articles of household furniture situated in a hotel for a sum named, but before delivery he removed a number of articles from the premises, and substituted therefor some other articles of less value. Upon discovery of these facts the defendant refused to carry out the agreement, and left the property in the possession of the plaintiff. *Held*, that the defendant was entitled to rescind the sale, and recover of the plaintiff the money paid thereunder. *Kuhlman v. Wood*, 128.

ANTE-NUPTIAL AGREEMENTS. See Husband and Wife, 2, 3, 4.

See Public Lands.

CONTRIBUTION.

BY PARTNERS TO CAPITAL. See Partnership, 4; Sureties.

CONTRIBUTORY NEGLIGENCE. See Negligence, 9, 10, 11, 12.

CONVERSION.

AGENT.

1. *Cannot excuse unlawful acts because of agency.* One charged with the unlawful seizure and conversion of personal property cannot escape liability therefor upon the ground that the seizure and conversion were made by him simply as the agent of another. *Warder-Bushnell & G. Co. v. Harris*, 153.

TITLE TO PROPERTY.

2. *Fraud.* The goods in question having been taken from the plaintiff, under a writ of attachment against the property of her vendor, the jury were instructed that, if the plaintiff purchased for value before the levy, she was entitled to recover therefor, "unless they further found" that the purchase was not in good faith, or that she had notice that her vendor intended to defraud his creditors, or that she had knowledge of facts which should

CONVERSION. TITLE TO PROPERTY. *Continued.*

have put her on inquiry, and that would have led to that knowledge, or that she purchased in pursuance of a conspiracy to defraud the creditors of her vendor. *Held*, that the instruction was proper. *Allen v. Kirk*, 658.

DAMAGES.

3. *Conversion of chattels by mortgagee.* The measure of damages recoverable for the conversion of mortgaged chattels by a wrongful sale thereof by the mortgagee is the difference between the price for which the property sold and the market value thereof on the date of such sale. *Gravel v. Clough*, 272.

4. *Rent of store room.* The defendant having taken possession of and used the storeroom in which the goods in question were situated at the time of the levy of an attachment, *held*, that evidence of the plaintiff's leasehold interest in the premises, and of the amount of rent paid thereunder, was competent as an element of damage. *Allen v. Kirk*, 658.

See Damages, 1, 2.

CONVEYANCES.

DESCRIPTION OF PROPERTY.

1. *Void for uncertainty.* A tax deed describing the property conveyed as the "undivided twenty acres, the southeast quarter of the southwest quarter of section ten," etc., is void for uncertainty. *Ellsworth v. Nelson*, 56.

2. *Personal property attached to real estate—construction.* A conveyance of real estate, made by a widow woman to her son, just preceding her death, contained this clause: "And also one-half of all personal property, of every name or nature, attached to the above real estate." *Held*, that, in view of the facts and circumstances surrounding the parties at the time of the transfer, the deed was to be construed as referring to all the personal property upon the real estate described, and not simply to such as is designated by law as fixtures. *In re Estate of Hoffman*, 292.

CONSIDERATION.

8. *Care and maintenance as consideration—default in—rescission.* The plaintiff, a woman of sixty-two years of age, and in infirm health, conveyed to defendant, her son, by quitclaim deed, eighty-five acres of land, valued at six thousand dollars, in consideration of "future maintenance and care." The defendant moved upon the land, and made certain improvements and repairs, which were largely paid for out of the proceeds of the farm. After four or five months the parties disagreed, and, upon plaintiff's direction

and demand, the defendant removed from the premises. *Held*, that the contract was to be construed as binding the defendant to give to the plaintiff such care and attention as her age and infirmities demanded for her comfort, which included not only physical comforts, but gentleness, indulgence and friendly words of encouragement; and that defendant, having failed to care for the plaintiff in accord with this requirement, had violated his contract as expressed in said deed; and, by his withdrawal from the premises, having shown his determination to continue in its violation, a decree setting aside the conveyance was proper. *Patterson v. Patterson*, 626.

DELIVERY OF DEED.

4. *Evidence.* The notary who drew the above deed testified that he delivered the same to the grantee, but, on cross-examination stated, that the deed was left with some notes in his possession, with the understanding that he should hold them, so that in case the grantor should recover "she could have the property if she liked," and that there was to be no delivery of the deed until she died. On redirect examination the witness stated that he did not recollect that the grantor said anything to him about holding the deed, but that he had held the same at the request of the grantee. *Held*, that, this being a proceeding in probate, the finding of the district court that there was a delivery of the deed has the force of a verdict of a jury, and the same would not be disturbed. *In re Estate of Hoffman*, 292.

ALTERATION OF.

5. *Change in description—evidence.* The plaintiff, having commenced this action to foreclose a mortgage, the mortgagor answered admitting his signature to the instrument, but alleging that since its execution the property description therein had been altered so that it covered sixty acres of land instead of twenty, and that the additional forty acres constituted his homestead. These allegations were supported by the testimony of the mortgagor and his son, but the loan agent, who drew up the mortgage, testified that it was originally drawn to cover the sixty acres, and that he refused to make the loan on the twenty acres. Among other circumstances corroborative of the loan agent's testimony was the fact that the twenty acres was insufficient security for the loan made. *Held*, that the burden of proof being upon the mortgagor the charge of alteration was not established. *Potter v. Kennelly*, 96.

EXECUTION IN BLANK.

6. *Homestead—cancellation—evidence.* In an action in equity to obtain the cancellation of a mortgage upon the ground that the plaintiff, a married woman, had signed the same with the property

CONVEYANCES. EXECUTION IN BLANK. *Continued.*

description blank, and that subsequently her husband, before delivery to defendant, inserted the description of property constituting their homestead, it appeared that the mortgage was prepared by the attorney for the defendant, upon an ordinary printed form, all blanks being properly filled ready for execution except that for the description of the property mortgaged, which blank was afterwards filled by defendant's husband by inserting the description of the homestead in question. The mortgage was acknowledged before a notary in the bank, and both the plaintiff and her husband testified positively that at the time of such acknowledgment the instrument contained no description of the property in question. In this they were partially corroborated by two witnesses. On the other hand the notary and defendant's cashier were equally positive that the mortgage did then contain such description, and they were corroborated by the presumption arising from the condition of the mortgage at the time of the trial, and by the testimony of the president of the bank. *Held*, that it was not shown by a preponderance of the evidence that the description of the homestead was not contained in the mortgage at the time of plaintiff's acknowledgment thereof. *Harding v. Des Moines Nat. Bank*, 499.

AGREEMENT TO CONVEY.

7. *Release of dower—evidence.* In an action to foreclose a mortgage on real property for the collection of one-sixth of the purchase price thereof, the defendant claimed that he held a deed of the plaintiff's interest in the land only, and that at the time of the purchase the plaintiff agreed to make the title complete by obtaining his wife's signature thereto. The defendant's testimony was corroborated by the two witnesses who were present at the exchange of papers. The plaintiff's denial of such agreement was unsupported by direct evidence, except that one witness, who was present when the terms of sale were talked over, testified that nothing was then said about the wife, but it appeared that prior to the sale the plaintiff and his wife had separated, and a suit between them was then pending for a divorce, in which the defendant was attorney for plaintiff, and had advised plaintiff, prior to the execution of the deed in controversy, to obtain a conveyance of these lands from his wife, which he did, and, after the deed to defendant, delivered the same to said defendant at his request. *Held*, that the claim of defendant was supported by the evidence, and that plaintiff's petition should be dismissed. *Blasser v. Moats*, 460.

8. *Parent and child—gift—evidence.* The defendant, a man advanced in years, being the owner of two hundred and twenty acres of land, and having three sons and a daughter, wrote two of the former, who resided in a distant state, that if they would

return home he would defray a part of their traveling expenses, divide his land, with the exception of five or six acres reserved for his own use, into equal parts, apportion the same by each of the children drawing cuts for his share, and then he would ask no more than the fourth part of what they could raise. The absent sons returned home, and, after a residence of some months with their parents, the plaintiff took up his residence in a log-house on a part of the farm that was marked off and designated as for him, and continued to occupy and farm the same for about twelve years, when he made a sale of all his personal property, removed to another state, entered one hundred and sixty acres of land, and remained there a year or two, until he had proved up the same as a homestead. During plaintiff's absence his father rented the land that had been occupied by him to another, but upon plaintiff's return he again took possession. *Held*, that the evidence was insufficient to establish an agreement on the part of defendant to convey to plaintiff as a gift the land occupied by him. *Lich v Lich*, 84.

CORPORATIONS.

SUBSCRIPTION TO STOCK.

1. *Fraud.* The representation by a promoter of a corporation to one, as an inducement to his subscription to the capital stock in such corporation, that a person named, of wide reputation for his sagacity in business affairs, had agreed to subscribe for a large amount of the same stock, without disclosing the fact that said stock was given such person as a gratuity for the use of his name, is such a fraud as will entitle one who has subscribed for stock upon the faith of such representation to have his contract of subscription canceled in a court of equity. *Coles v. Kennedy*, 360.

REINCORPORATION.

2. *Contracts—liabilities.*—An unincorporated coal and mining company, having become insolvent, and most of its property having been seized by attaching creditors, it was agreed, at a meeting of its members, that they organize a stock company for the conduct of the same business, and that it should assume and pay the debts of the old company. It was further agreed, at such meeting, that the plaintiff, a member of the old company, should receive, in consideration of a part of its indebtedness to him, paid-up stock in the proposed corporation. Such corporation was organized, but it received no property of value from the old company, and it never ratified the above agreements of that company. *Held*, that the old company's promise of stock to the plaintiff could not be enforced against the new company, nor was it liable for the balance of his account against the old company, because of the latter's agreements. *Carey v. Des Moines Coal Co.*, 674.

CORPORATIONS. *Continued.*

STOCK.

3. *Transfer—sufficiency.* Under section 1078 of the Code, which provides that a transfer of shares in a corporation is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, *held* that an entry by the secretary of the company, in the stock book, that the shares had been assigned as collateral security, was sufficient to defeat a subsequent levy of an execution upon them by the creditors of the assignor. *Moore v. Marshalltown, etc., Co.*, 45.

4. *Levy of execution—method.* Under sections 2967 (subd. 3) and 3050 of the Code, an execution can be levied upon stocks in a corporation only by notifying the president, or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been levied upon; and such notice must be in writing. Mere oral notice, with a writing upon the back of the stub of the certificates in the stock book, is not sufficient. *Id.*

COSTS.

APPORTIONMENT OF.

1. *Defendant successful on counter-claim.* Where issue is taken upon the demands of the plaintiff in a cause, and he recovers in part, and the defendant is partially successful upon a counter-claim therein, the costs of the suit should be equitably apportioned between them. *Gravel v. Clough*, 272.

COPY FEES.

2. *District court rules—excessive fees.* Rule number one of the district court rules does not require that a literal copy should be made of various pleadings in a cause which are precisely alike, except, possibly, a date, an amount, or the like; and a charge under said rule of five hundred and eighty-two dollars for copies of such pleadings, the printing of which cost but thirty dollars for both originals and copies, *held*, should be reduced to fifteen dollars. *Cook et al. v. C., R. I. & P. Ry. Co.*, 551.

IN CRIMINAL CASES ON APPEAL.

3. *Printing of record not taxable as costs in cause.* The expense of printing abstracts of the record in criminal cases under Acts, Twenty-first General Assembly, chapter 73, section 2, and of amendments to such abstracts when filed by the accused, for the use of the attorney general, is not taxable as part of the costs in the cause to be paid by the county wherein the accused was indicted, but should be paid by the state upon allowance by the executive council. *State v. Billings*, 566.

DAMAGES.

WHAT MAY BE RECOVERED.

1. *Rent—evidence.* The defendant having taken possession of and used the storeroom in which the goods in question were situated at the time of the levy of an attachment, *held*, that evidence of the plaintiff's leasehold interest in the premises, and of the amount of rent paid thereunder, was competent as an element of damage for the conversion of said property. *Allen v. Kirk*, 658.

2. *Interest on value of attached property.* In an action for the wrongful suing out of an attachment against property used only for the purposes of sale the owner is not entitled to recover, as damages, interest on the value of such property from the time of seizure, without a showing of any loss, merely from the failure to have the property on hand. *Fullerton Lumber Co. v. Spencer*, 549.

MEASURE OF.

3. *Conversion of chattels by mortgagee.* The measure of damages recoverable for the conversion of mortgaged chattels by a wrongful sale thereof by the mortgagee is the difference between the price for which the property sold and the market value thereof on the date of such sale. *Gravel v. Clough*, 272.

WHEN A QUESTION FOR THE COURT.

4. *Measure of not disputed.* Where in an action for the possession of certain real estate, and for damages for the wrongful detention thereof, the question of ownership has been determined by the court, sitting as in equity, in favor of the plaintiff, the question of damages for the wrongful detention need not be submitted to a jury if the evidence discloses no dispute as to the facts upon which the recovery therefor is based. *Woodbridge v. Austin*, 671.

AWARD IN CERTAIN CASES.

5. *Loss of hand.* A verdict for damages in the sum of seventy-five hundred dollars for an injury resulting in the loss of a hand to an employe in a sawmill, whose expectation of life is about forty-six years, *held*, not excessive in view of the facts of this case. *Sprague v. Atlee*, 1.

6. *Negligence—loss of hand.* A verdict of five thousand dollars for the loss of a right hand by one employed as a "wiper" in the roundhouse of a railroad company is not excessive. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

BREACH OF WARRANTY.

7. *Sale—knowledge of vendor—evidence.* The liability of a vendor to a vendee for damages for breach of warranty of personal property does not depend upon his knowledge that his warranty is false. *Short v. Matterson*, 638.

DAMAGES. *Continued.*

SPECIAL.

8. *Sale—breach of warranty—damages.* In an action for damages for a breach of warranty in a sale of a stallion, warranted to be a "sure colt getter," it was alleged in the pleadings that it was understood by the vendor at the time of the purchase, that the horse was for breeding purposes, and that he knew his warranty to be false. *Held*, that in addition to the difference between the actual value of the horse when received, and what his value would have been, if according to the warranty, the vendee was entitled to recover, as special damages, the reasonable costs and expenses incurred for advertising, keeping and standing the horse for breeding purposes, prior to the discovery of the breach of the warranty *Id.*

IN CASE OF INJUNCTION.

9. *Trespass on land—action on bond—pleading.* A petition in an action for damages on an injunction bond alleged that the defendant caused an injunction to be issued restraining plaintiff from trespassing on certain real estate; that plaintiff was put to great trouble and expense in defending against the wrongful issuance of said injunction, and in obtaining its dissolution, including an attorney's fee of fifty dollars, and twenty days of his own time; but not stating upon what ground the injunction was issued, nor upon what ground it was dissolved, nor that plaintiff was thereby prevented from the exercise and enjoyment of some substantial right to which he was entitled, is bad on demurrer. *Hibbs v. Western Land Co.*, 285.

DEED. See Conveyances; Mortgages of Personal Property; Mortgages of Real Estate; Sales.

DIVORCE.

CRUEL AND INHUMAN TREATMENT.

1. *Epithets accompanied with threats of violence.* The address of base epithets such as bitch, hellyon, a son of a bitch, by a husband to his wife, accompanied with such threats of physical violence as shaking his fists in her face, and at times threatening to shoot her, and with occasional acts of violence toward the person of the wife, rendering her lame or bruised for some days, is such inhuman treatment as may be said, as a matter of law, to endanger the life of the wife, where the husband is a strong man physically, and possessed of an ungovernable temper, while the wife is not possessed of good health nor of much physical endurance; although the organization and temperament of the wife is such that the use of the base epithets alone could not be held. as a matter of law, to endanger her life. *Douglass v. Douglass*, 258.

DIVORCE. CRUEL AND INHUMAN TREATMENT. *Continued.*

2. *Condonation.* Cohabitation with the husband after the commencement of a suit by a wife for divorce, upon the ground of inhuman treatment, will not constitute a condonation of the offense on account of which the divorce is asked, where the inhuman treatment is continued during the time of such cohabitation. *Id.*

ALIMONY.

3. *Where the amount of* the husband's property was variously estimated to be from twelve to thirty-seven thousands of dollars above all indebtedness, *held*, that an award to the plaintiff as alimony of four-sevenths of a piece of property valued at fifteen thousands of dollars, and the sum of two hundred and fifty dollars for attorney's fee, was not excessive. *Id.*

DOWER. See Husband and Wife, 2.

ELECTION See Agency, 3; Assignment for Benefit of Creditors, 4.

EMBEZZLEMENT.

INDICTMENT.

1. *Variance.* Where an indictment for embezzlement is based upon the employment of one as agent for the sale of certain personal property to a person named, proof on the part of the state of authority to sell to any person is not such a variance as will support a motion for verdict in favor of the defendant. *State v. Foley*, 36.

See Indictment.

PROOF OF.

2. *Surplusage.* Where an indictment for embezzlement alleges the various purposes to which the funds converted were used, proof of such allegations is not necessary to a conviction. *State v. King*, 587.

3. *Receipt—demand—accounting.* Such charge will be considered established where the evidence shows the receipt of the property in question by the accused as agent for the person named as principal, and that upon demand, at a time when the principal was entitled to an accounting, he failed and refused to account for the same. *State v. Foley*, 36.

4. *After the board of supervisors* had made demand upon the defendant for a settlement of his accounts as treasurer, and time had been given him to write up his books, and he had been urged by the board from time to time to produce the money that should be in his custody, the defendant tendered some money and bank drafts necessary to make up the amount, but the board refused to receive the drafts as money, and again defendant produced the

EMBEZZLEMENT. PROOF OF. *Continued.*

proper amount of money, but the board refused to settle with him, because he demanded that the money be immediately returned to him. When defendant was finally removed from office, he was found to be in default in the sum of over twenty thousand dollars, and no explanation of the defalcation was made upon the trial. *Held*, that the charge of embezzlement was supported by the evidence. *State v. King*, 587.

5. *The introduction of the record* of the board of supervisors in such case to show the report of the defendant as treasurer *held*, to be without prejudice, when the report itself was afterwards introduced in evidence. *Id.*

EQUITY.

JURISDICTION.

1. *Accounting between partners.* An action for an accounting between partners involving charges of fraud, accident or mistake, and requiring extended investigations of books of account and invoices, is properly brought in equity. *Donahue v. McCosh*, 296.

2. *Mistake of law.* The voluntary payment by a county, through its authorized agents, of fees claimed by one for services rendered in his capacity as sheriff of the county, under the mutually mistaken belief that the county is legally bound therefor, is a mistake of law and not of fact, and will not support an action for the recovery thereof by the county. *Painter v. Polk County*, 242.

ACCOUNTING.

3. *Pleading—evidence.* In an action in equity for an accounting with defendant, based upon the latter's possession of certain promissory notes delivered to it as collateral security for a debt owing it by plaintiff's assignor, the plaintiff alleged in his petition that, after the payment of defendant's claim, a large number of notes yet remained in its hands, "which were valuable," and that, upon demand, defendant had refused to surrender or account for the same. *Held*, that under a general denial in the answer, the defendant was entitled to show that the notes were of no value at any time. *Sickles v. Dallas Center Bank*, 408.

4. *Decree.* Under the evidence, *held*, that the plaintiff was entitled to a decree requiring defendant to surrender the notes in controversy, and for costs of suit in the district court. [GRANGER, J., *dissenting*] *Id.*

See Estoppel, 1.

SPECIFIC PERFORMANCE.

5. *Gift—evidence.* The defendant, a man advanced in years, being the owner of two hundred and twenty acres of land, and having three sons and a daughter, wrote two of the former, who

EQUITY. SPECIFIC PERFORMANCE. *Continued.*

resided in a distant state, that if they would return home he would defray a part of their traveling expenses, divide his land, with the exception of five or six acres reserved for his own use, into equal parts, apportion the same by each of the children drawing cuts for his share, and then he would ask no more than the fourth part of what they could raise. The absent sons returned home, and, after a residence of some months with their parents, the plaintiff took up his residence in a log-house on a part of the farm that was marked off and designated as for him, and continued to occupy and farm the same for about twelve years, when he made a sale of all his personal property, removed to another state, entered one hundred and sixty acres of land, and remained there a year or two until he had proved up the same as a homestead. During plaintiff's absence his father rented the land that had been occupied by him to another, but upon plaintiff's return he again took possession. *Held*, that the evidence was insufficient to establish an agreement on the part of the defendant to convey to plaintiff as a gift the land occupied by him. *Lich v. Lich*, 84.

SUBMISSION OF LAW QUESTIONS TO JURY.

6. *Will not affect right of trial de novo on appeal.* The submission of questions of fact in an equity cause to a jury for determination, though contrary to the rules of practice prescribed by the Code for the court of chancery, will not have the effect to transfer the case to the law side of the court, nor to deprive the parties, upon appeal, to a trial *de novo* in the supreme court. *Frank v. Hollands*, 164.

ESTATES OF DECEDENTS.

DISCHARGE OF EXECUTORS AND ADMINISTRATORS.

1. *Without notice to claimants invalid.* The discharge of an administrator after the statutory period for the filing of claims, while a claim of the third class, duly verified and filed, remains unsettled, nor in any manner acted upon by the administrator, nor by the court, though not admitted nor proved, without notice to the claimant of the application for discharge, is invalid, and may be set aside on petition by such claimant therefor. *Godes v. Hasen*, 197.

2. *Notice—insolvency of estate.* In such case it is not necessary for the claimant to show that the estate was solvent, nor that the administrator had assets with which to pay his claim. Prejudice will be presumed. *Id.*

ESTOPPEL.

RECITALS IN RECEIPT.

1. *Trustee and cestui que trust—accounting.* A *cestui que trust* is not estopped from claiming an accounting with his trustee, because of a receipt made to the latter acknowledging full satisfaction of the interest of the *cestui que trust* in the trust estate, and

ESTOPPEL. RECITALS IN RECEIPT. *Continued.*

discharging the trustee from further liability therein, where the settlement in pursuance of which such receipt was made was based upon the false representations of the trustee, and the *cestui que trust* was ignorant of the real condition of the estate. *Barton v. Fuson*, 575.

MUNICIPAL ORDERS.

2. *For illegal indebtedness—not an estoppel against denial of liability.* The township trustees having agreed that the township clerk should receive certain moneys held by the county treasurer, and that therewith all the *legal* debts of the township should be paid, the county treasurer paid to said clerk the proceeds of a tax levied and collected for the payment of the orders above referred to. *Held*, that the orders not being a *legal* debt, the officers of the township were not estopped, under their agreement, from denying liability for the money so received. *Cass County Bank v. Conrad*, 482.

THROUGH LACHES.

3. *Omission to assert title against tax deed for twenty-eight years.* A tax deed issued upon insufficient notice will not be deemed invalid as against one claiming the property as owner, whose interest therein does not appear of record, and who for nearly twenty-eight years stood silently by and permitted others to pay the taxes thereon, and spend money and labor in acquiring title and improving the land. *Baird v. Ellsworth*, 629.

4. *Ownership of land—adverse claimants.* Certain facts *held* to constitute such laches on the part of the plaintiff as to estop him from claiming title to certain real estate adverse to defendants. *Withrow v. Walker*, 651.

AGAINST VENDOR.

5. *Pharmacy law—evasion—estoppel.* Where the owner of a stock of merchandise transferred the same to another, to be held and treated by him as its ostensible owner, for the purpose of evading the law relating to registered pharmacists, and the property is levied upon under execution as that of the person so in possession, the real owner will be estopped from claiming any title thereto. *McIntosh v. Wilson*, 339.

See Partnership; Agency.

EVIDENCE.

MATERIALITY.

1. *Sale—mortgage—notice.* In a contest between mortgagees of certain personal property as to the priority of their respective mortgages, testimony of third persons on behalf of plaintiff as to whether they had heard of the sale under which defendant claimed, *held* immaterial. *Lansley v. Van Alstyne*, 476.

EVIDENCE. MATERIALITY. *Continued.*

2. *Murder—sale of revolvers.* A witness for the defendant, having testified to having sold two revolvers to the accused, was asked various questions on cross-examination, as to whom the same were charged on his books, and whether they were not charged to defendant's employers. *Held*, that the inquiry was material. *State v. Row*, 138.

3. *Discharge of witness for prosecution in criminal cause.* The exclusion of the testimony of a witness, upon a trial for a criminal offense, that he was subpœnaed by the state and had been discharged by its counsel without being called to testify, is not erroneous. *Id.*

4. *Intoxicating liquors—illegal sale.* In a prosecution for the illegal sale of intoxicating liquors to a person named, the books of an express company showing the dates upon which boxes of goods shipped from the defendant's place of residence to such person were received at the residence of the latter, and that they were delivered to him, and the date of such delivery is material. *State v. Kriechbaum*, 633.

5. *Personal injury—belief of coemploye.* In an action for damages for a personal injury sustained by a "wiper" while engaged in coupling a car to an engine, evidence of the belief, expectation or purpose of a coemploye in charge of the engine, with which said coupling was made, as to the action of the employe making the coupling, of which the latter had no knowledge, is not admissible in an action to recover for injuries sustained in such service. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

RELEVANCY.

6. *Incest—quarrels between father and sons.* Upon a trial under an indictment for the crime of incest committed by a father with his daughter, evidence that the defendant had six years previously quarreled with his sons, and caused them to leave his house, for causes having no relation to the commission of the crime, is irrelevant. *State v. Moore*, 578.

7. *Accounting—pleading—general denial.* In an action in equity for an accounting with defendant, based upon the latter's possession of certain promissory notes delivered to it as collateral security for a debt owing it by plaintiff 's assignor, the plaintiff alleged in his petition that, after the payment of defendant's claim, a large number of notes yet remained in its hands, "which were valuable," and that, upon demand, defendant had refused to surrender or account for the same. *Held*, that under a general denial in the answer, the defendant was entitled to show that the notes were of no value at any time. *Sickles v. Dallas Center Bank*, 408.

8. *Payment of promissory note.* In an action upon two promissory notes, held by plaintiff as guardian, the defendant pleaded payment, and alleged that the notes were not surrendered because of the representations of plaintiff that the same were lost or mislaid. The plaintiff admitted that the notes had been mislaid, but alleged that it was through fault of the bank where they were deposited, and denied payment. *Held*, under the issue thus presented, that defendant might show, that about six years after the alleged payment the plaintiff voluntarily executed a trust deed as additional security to the sureties upon his bond as guardian, and all the facts leading to its execution; also the reports made by plaintiff, as guardian, showing how he treated the notes in question; also such accountings as tended to show whether the money had been received; and the failure of defendant at times to make reports of his doings as required by law. *Shockley v. Van Eaton*, 417.

9. *Under the defense of payment to an action upon a promissory note*, evidence of plaintiff's conduct in other transactions, entirely independent of that in controversy, indicating a defective memory and liability to mistake, is not competent. *Id.*

10. *Neither is it competent* for the defendant to show in such case that the plaintiff was sick and affected mentally about five years after the date of the alleged payment. *Id.*

11. *Libel—malice.* Upon cross-examination the defendant was asked if he had not formerly supported the subject of the alleged libel for office; also, whether he had not solicited his support for a particular office; to both of which questions the defendant objected as being incompetent and immaterial. *Held*, that, as defendant's publication of the libel may have been prompted through disappointment in not receiving the coveted office, proof of the facts sought to be elicited was proper as tending to show malice on the part of defendant. *State v. Conable*, 60.

COMPETENCY.

12. *Parol testimony—contents of lost letter.* After proof of the loss of a letter received by the defendant, in company with an affidavit to the facts charged in the alleged libelous article, the defendant proposed to show the contents of such letter to be, that the writer had investigated the case, and was satisfied that the facts set out in the affidavit were true, but there was no ruling upon the offer of such proof, nor any effort to introduce the evidence after making the offer. *Held*, that, while the defendant would have been entitled to prove the contents of the letter as stated, no error could be predicated upon the refusal of the district court to admit secondary evidence of such letter before defendant's statement of what he expected to prove thereby. *Id.*

EVIDENCE. COMPETENCY. *Continued.*

13. *Parol testimony—subject-matter of letter.* After the introduction of oral evidence, against the objection of defendant, to the fact that a letter had been written the defendant concerning the policy in question, the proof of loss, and payment thereunder, the plaintiff offered in evidence a letter received from defendant's attorney, purporting to be in reply to the above, and stating the reason why payment of the policy was refused to be the taking out of additional insurance, and other irregularities, in violation of the policy, but making no objection to the sufficiency of the proof of loss. *Held*, that parol evidence to the fact of plaintiff 's letter and its subject-matter was competent, and that the admission of the defendant's reply, though not pertaining to a fact in issue, was error without prejudice. *Hagan v. Merchants', etc., Ins. Co.*, 321.

14. *Parol evidence of title to real estate.* Where the question of title to real property is only incidentally involved in a cause, parol evidence of such fact will, in the absence of any objection thereto, be regarded as competent, and its competency cannot be questioned for the first time on a motion by the opposite party for an instruction to the jury to return a verdict in its favor. *Fish v. Chicago, R. I. & P. Ry. Co.*, 280.

15. *Parol evidence to explain return of execution.* The sheriff 's return of the execution showed that the two tracts of land were offered separately, but did not show which was offered first. *Held*, that it was competent to show by parol evidence the order in which the different parcels were offered for sale. *Smith v. DeKock*, 535.

16. *Parol testimony—insurance—proof of loss.* The form or sufficiency of the proof of loss made by plaintiff not being in issue, but simply the fact whether such proof had been made, *held*, that such fact might be established by parol, and no prejudice could arise from the introduction of secondary evidence of the notice served upon the defendant. *Hagan v. Merchants', etc., Ins. Co.*, 321.

17. *Explanation as to signature to written instrument.* In an action involving the validity of a conveyance of the property of a copartnership, a member of the firm may be permitted to testify that his signature to such instrument was obtained without his knowledge of the fact that it was intended in part in payment of the private indebtedness of one of his copartners. *Newell & Co. v. Martin et al.*, 238.

18. *In such action evidence* that such partner assented to said conveyance, with full knowledge of its purpose, after the rights of creditors had attached, is incompetent. *Id.*

EVIDENCE. COMPETENCY. *Continued.*

19. *Declarations.* Where a man and a woman have been indicted jointly for lewd cohabitation, proof of the declarations of one of the defendants to third persons, and not in the presence of the other defendant, is admissible in evidence; but the jury should be instructed as to the effect to be given such testimony. *State v. Miller*, 72.

20. *Declarations of witness deceased.* Proof of the declarations of a witness, since deceased, upon the trial of one on preliminary information for assault and battery, may be made in a subsequent trial of the same defendant on a charge of murder, based upon the same act, by a witness, who was present at the former trial, and heard the testimony of such deceased witness, and remembers, and can repeat, the substance of the whole of his testimony, though he cannot remember the exact language used by the deceased, nor state the facts in the order in which they were testified to. *State v. O'Brien*, 88.

21. *Declarations of vendor in cases of fraud.* In such an action, the declarations of the vendor, made under oath, in relation to transactions between him and the vendee, but in the absence of the latter, and after the consummation of the sale, are not admissible in evidence as against the vendee, even under an issue as to a conspiracy between the parties in such transaction to defraud creditors. *Allen v. Kirk*, 658.

22. *Declarations of husband and wife against each other.* In an action by a married woman proof of the declarations of her husband, alleged to have been made while acting as the agent of the wife, are not admissible in evidence against the wife in the absence of proof of such agency. *Judge v. Jordan*, 519.

23. *Declarations of coconspirators.* It is not the rule that when a conspiracy is formed all admissions, acts and declarations of a coconspirator may be put in evidence against the others, but only such as are done or made in furtherance of their plans. *State v. McGee*, 17.

24. *Declarations of coconspirators—res gestæ.* The court instructed the jury "that no evidence of anything said, done or written by the plaintiff's vendor, or the other alleged coconspirators, could be considered against the plaintiff," unless they found that she had entered into said conspiracy, and that what was said or done was in furtherance of the common design. *Held*, that, in view of the subject of the instruction, it was not to be construed as excluding from the consideration of the jury acts and declarations of the persons named which would be competent as part of the *res gestæ*, though no conspiracy existed. *Allen v. Kirk*, 658.

EVIDENCE. COMPETENCY. *Continued.*

25. *Declarations of agent—payment.* Proof of declarations made by an agent in the course of his employment for the sale and lease of certain lands, that such lands had been conveyed to his principal in payment of a promissory note held by the principal against the latter's grantor, is not admissible in an action by the principal against the grantor for the collection of such note to show payment thereof. *Sioux Val. State Bank v. Kellog*, 124.

26. *Ante-mortem statement.* An *ante-mortem* statement by the victim of an assault resulting in death, made at a time when he believes that his death is near at hand, and giving the facts as he claims them to be, is competent evidence against one accused of making such assault; and its admission in evidence will not be deemed erroneous by reason of a single incompetent statement therein which might have been excluded upon the objection of the defendant. *State v. O'Brien*, 88.

27. *Ante-mortem statement.* The victim of defendant's assault was wounded in the bowels, causing his death two days thereafter. Some time after the shooting, but on the same day, the county attorney waited upon the wounded man, and, after talking with him, requested that he make a statement for use in court. Such statement was thereupon made, presenting a brief narrative of the material facts connected with the shooting, and reciting that affiant made it freely, that he was in his right mind, and that same was made in the belief that he could not get well of the wound he had received. *Held*, that the statement was competent as a dying declaration. *State v. Murdy*, 603.

28. *Public officer—proof of capacity.* Testimony that one has acted in the capacity of a stated public official is competent evidence that he occupies such official position. *State v. Row*, 138.

29. *Sales—ability of vendee to pay.*—Evidence that, some time prior to the date of the sale in question, the vendee offered twenty-five hundred dollars for a house, and at the time had a large package of money in her hand, *held*, competent as showing the vendee's ability to pay for the goods purchased. *Allen v. Kirk*, 658.

30. *Values—stock of merchandise.* The value of a stock of merchandise cannot be shown by estimates thereof made by persons inexperienced in buying or selling goods in the same line, without examination, and without knowledge as to their quality, quantity or cost. *Id.*

31. *Libel—truth of statements.* The libelous matter, upon which the indictment was based in this case, charged a candidate for office with an agreement to sell an appointment to an office supposed to be under his control if elected, but the other party to the agreement was not named in the indictment. *Held*, that the

person subsequently receiving such appointment, upon the recommendation of such candidate, although not the person with whom the defendant had charged the agreement had been made, might be permitted to testify upon the trial that he never gave, nor offered to give, anything to secure the appointment, as tending to show that the charge contained in the alleged libel was untrue. *State v. Conable*, 60.

32. *Libel—contemporaneous publications.* Upon a trial under an indictment for libel based upon a specific portion of an article published during a political campaign concerning a candidate for office, the balance of such article and other disparaging articles published by the defendant during the same campaign, and concerning the same candidate, though not of a libelous nature, may be given in evidence by the state, if, taken in connection with the alleged libel, they will assist in determining the motive with which the publication was made. *Id.*

33. *Personal injury—complaints of pain.* The testimony of a witness as to complaints of pain or disease made by the plaintiff a week after the accident in which his injury was sustained is competent to show the condition of plaintiff's health, and the permanency of the injury received. *Blair v. Madison County*, 313.

34. *Railroad switch—proof of construction by attorney.* After the testimony of defendant's station agent, where the accident occurred, that he had held such position prior to the time of the accident and up to the time of the trial, and did not know of any change in the switch in question having been made, one of the plaintiff's attorneys was permitted to testify as to the result of his measurements of the distances between the rails at the switch, fourteen months after the accident, and of experiments made by him in placing his foot between the rails, and showing where the foot could be caught and where not, the shoe worn by defendant being before the jury at the time. *Held*, that the evidence was competent. *Brooke v. C., R. I. & P. Ry. Co.*, 504.

35. *Employment of minors—apparent intelligence.* Testimony of the apparent intelligence of a minor, and of his apparent understanding of mill machinery, is not competent as proof of his capacity to operate such machinery. Moreover, where such minor has testified upon the trial the jury are as competent as others to judge of his intelligence. *Sprague v. Atlee*, 1.

36. *Resolution of city council—incumbrance of streets—repairs—evidence.* In an action by one, who had deposited rock in a city street, to recover of the city the value of such rock, which it was alleged had been used by the city in the repair of the street at the point of such deposit, the plaintiff introduced in evidence a resolution of the city council, passed the year before the appropriation

EVIDENCE. COMPETENCY. *Continued.*

of material complained of, and directing the street commissioner to repair the street in question. *Held*, that the evidence was competent upon the question whether the city authorized the repair in which the material was used, and the question whether it related to the repair in controversy was for the jury to determine. *Kemper v. City of Burlington*, 354.

37. *Distinction between matters of fact and opinion.* An inquiry whether specified services sued upon were rendered by an attorney in pursuance of a particular contract calls for a fact and not an opinion, and is one that may be answered by the client. *Jamison v. Weaver*, 212.

38. *Damages in cases of attachment.* In an action for the wrongful suing out of an attachment levied upon a stock of merchandise which was thereupon removed from the storeroom where it had been kept, evidence of the value of the stock, and that a portion thereof was of a perishable nature, and of the extent to which the same was damaged is competent. *Id.*

39. *Liquor nuisance—evidence of liquors found at another place.* Upon an indictment for keeping a saloon nuisance, after a witness had given testimony tending to show that liquors were kept and sold by defendant at the place named, it was proper to allow him to testify to finding five barrels of bottled beer at the residence of defendant's father, with whom defendant resided, in another part of the city. *State v. Illsley*, 49.

40. *Murder—proceedings of coroner's jury.* The minutes of the proceeding and verdict of a coroner's jury upon the inquest over the body of one murdered are not admissible in evidence upon the trial of one under indictment for such murder. *State v. Row*, 138.

41. *Murder—minutes of grand jury.* Two members of the grand jury, which had found the indictment under which defendant was on trial, were called by the state on rebuttal for the purpose of proving what was the testimony of one of defendant's witnesses before such jury, and of thereby contradicting his testimony given upon the trial. In framing his questions to such witnesses counsel for the state used the minutes of the testimony taken before the grand jury. *Held*, without determining whether such use of said minutes might not be in a manner to make it prejudicial, that the record in this case showed no just ground for complaint on that account. *Id.*

42. *Testimony in rebuttal—prosecution for rape.* Where, upon a trial under an indictment for rape, the prosecuting witness has given explicit testimony to the fact of the penetration of her body, and a physician, who had examined her organs shortly after the act is alleged to have been committed, testifies upon behalf of the

accused, that at the time of his examination he found the hymen "intact" and "without rupture," testimony by physicians for the prosecution as to the condition of the hymen at the time of an examination subsequently made by them, and indicating penetration in fact, is competent as proof in rebuttal. *State v. Watson*, 380.

ADMISSIONS.

43. *Testimony of witness uncontradicted.* Facts testified to by a party to a cause against his interest, if unquestioned, have the force of an admission as against the party so testifying, and the jury may be so instructed. *Judge v. Jordan*, 519.

44. *Verbal—character of evidence.* An instruction that, as a general rule, the statements of a witness as to verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake, is proper. *Allen v. Kirk*, 658.

BEST EVIDENCE.

45. *Testimony of experts—physician.* The question, put to a physician who had examined the plaintiff, whether his statement of plaintiff's injuries and symptoms, and the absence of external appearance of injury, were "consistent with his medical books,' is not objectionable on the ground that the medical books are the best evidence of their contents. *Blair v. Madison County*, 313.

TESTIMONY OF EXPERTS.

46. *Personal injury—defective machinery—evidence.* In an action for damages for a personal injury sustained by an employe while operating a steam saw, which was shown to be less generally used than other machines of its kind, and the operation of each described to the jury, the testimony of an expert that the gauge of the machine used by the defendant is as safe as that of any other machines then in use is inadmissible. *Sprague v. Atlee*, 1.

47. *Basis of opinion—previous testimony of other experts.* A witness, called as an expert, who has heard the testimony of another expert, given upon the same trial, in the presence of the jury, may be asked to give an opinion upon the state of facts thus heard by him, without the facts upon which the opinion is to be based being put to him in the form of a hypothetical question. *State v. Watson*, 380.

JUDICIAL NOTICE.

48. *Organization of counties.* Courts will take judicial notice of the organization of counties within the state. *Pitts v. Lewis*, 51; *Ellsworth v. Nelson*, 56.

EVIDENCE. *Continued.*

BURDEN OF PROOF.

49. *Alteration of written instrument—pleading.* In an action to recover upon a policy of insurance the insurance company alleged as a defense, that the policy had been altered since delivery without its knowledge or consent. The plaintiff denied the alteration, but alleged that if any change had in fact been made it was done before delivery to the plaintiff. *Held*, that the defendant's allegation charging an alteration of the policy was not such a denial of the instrument as threw upon plaintiff the burden of proving the execution of the same; but that such proof being necessary to support defendant's charge of alteration, its introduction by plaintiff was error without prejudice. *Hagan v. Merchants', etc., Ins. Co.*, 321.

50. *Alteration of written instrument.* A mere alteration apparent upon the face of a written instrument raises no presumption that the same has been fraudulently changed since its delivery, and will not impose upon a party claiming thereunder the burden of explaining such change before introducing it in evidence. *Id.*

51. *Fraudulent conveyance — instructions.* The defendant asked that the jury be instructed that, if plaintiff's vendor was insolvent, and made the sale in question to defraud his creditors, "and the sale is surrounded with suspicious circumstances in other respects," it is incumbent upon the plaintiff to show, by competent evidence, satisfactory to the jury, that she paid for the stock of goods as claimed by her; and that the ease and facility with which a fictitious payment may be fabricated require that she produce all the proof which may reasonably be supposed to be in her power of the reality and fairness of the transaction, and that the want of clear proof in this regard, and without any satisfactory explanation as to where the money which she claimed to have paid came from, and how it was obtained, is evidence of fraud, and it is not sufficient that the plaintiff merely make proof of payment, but she must give a reasonable explanation as to where the money came from, and how it was obtained, which she claims to have paid for the stock, as such proof is within her knowledge and power. *Held*, that the instruction called for more than a preponderance of the evidence to establish payment, and was rightly refused. *Allen v. Kirk*, 658.

52. *Intoxicating liquors—sales by nolder of permit.* Where a prosecution for the illegal sale of intoxicating liquors is against one holding a permit under the law to sell intoxicating liquors, and the fact that sales of liquors have been made by defendant is not questioned, the burden of proof is upon him to show that the sales were not in violation of law. *State v. Kriechbaum*, 633.

EVIDENCE. *Continued.*

SURPLUSAGE.

53. *Embezzlement—pleading.* Where an indictment for embezzlement alleges the various purposes to which the funds converted were used, proof of such allegations is not necessary to a conviction. *State v. King*, 587.

LEADING QUESTIONS.

54. *May be put to prosecutrix in prosecution for rape.* Upon a trial under an indictment for rape committed upon a girl of immature years, leading questions may, in the discretion of the court, be asked the girl as to the position occupied by the accused at the time the act is alleged to have been performed, as to any pain caused her by defendant's act, and as to evidence of violence subsequently found upon her clothing. *State v. Watson*, 880.

CROSS-EXAMINATION.

55. *Matters not inquired of on direct examination.* Matters which were not inquired of on examination in chief are not the proper subject for cross-examination. *Linden v. Green*, 865.

56. *Impeachment of witnesses—former conviction for criminal offense.* A person on trial for a criminal offense, who testifies in his own behalf, may, for the purposes of impeachment, be questioned on cross-examination as to former convictions for offenses previously committed by him. *State v. O'Brien*, 93.

57. *Murder—defendant's reputation.* On a trial for murder, after a witness for defendant had testified that his reputation for being a quiet and peaceable citizen was good, it was error to allow him, on cross-examination, to be interrogated as to his participation in particular quarrels. But, where the answers were all favorable to defendant, the error was no ground for complaint on his part. *State v. McGee*, 17.

58. *Burglary—testimony of accused.* A defendant, on trial for the crime of burglary, who has testified on direct examination to having seen a stranger come out of the premises entered as he went in, may be required on cross-examination to state who remained on the premises in question. *State v. O'Brien*, 93.

59. *Sales of personal property—fraud.* While, in an action involving the validity of a sale of personal property, alleged to have been made to defraud creditors, a wide latitude should be allowed in the cross-examination of the parties thereto, yet, where the record shows an extended cross-examination of a party, the cause will not be reversed because certain questions, pertaining to matters of an incidental or immaterial nature, or which were covered by previous inquiries, were not permitted. *Allen v. Kirk*, 658.

EVIDENCE. *Continued.*

PROOF OF PARTICULAR ISSUES.

60. *Agreement to convey real estate.* The plaintiffs, who are husband and wife, brought this action against the executor of the will of the husband's stepmother to secure the performance of an alleged parol agreement, made by the stepmother, during her lifetime, to convey to them certain real and personal property in consideration of care and attention to be given to her person and estate. The evidence showed that such care and attention was given the deceased until her death, but it amounted to little more than what might reasonably be expected from plaintiffs in view of the relationship of the parties. The value of the property in question was above ten thousands of dollars, and there was no evidence of any express agreement for its con· ·nce. The deceased, however, had been infirm for several years prior to her death, during a part of the time being incapable of taking care of herself, and a number of times gave expression to her gratitude to plaintiffs for remaining with and caring for her, and of her intention to leave said property to them for a home upon her decease. *Held*, that the evidence failed to show an agreement to convey. [BECK, J., *dissenting.*] *Sample v. Collins*, 23.

61. *Agreement to obtain release of dower.* In an action to foreclose a mortgage on real property for the collection of one-sixth of the purchase price thereof, the defendant claimed that he held a deed of the plaintiff's interest in the land only, and that at the time of the purchase the plaintiff agreed to make the title complete by obtaining his wife's signature thereto. The defendant's testimony was corroborated by two witnesses who were present at the exchange of papers. The plaintiff's denial of such agreement was unsupported by direct evidence, except that one witness, who was present when the terms of sale were talked over, testified that nothing was then said about the wife, but it appeared that prior to the sale the plaintiff and his wife had separated, and a suit between them was then pending for a divorce, in which the defendant was attorney for plaintiff, and had advised plaintiff, prior to the execution of the deed in controversy, to obtain a conveyance to these lands from his wife, which he did, and, after the deed to defendant, delivered the same to said defendant at his request. *Held*, that the claim of defendant was supported by the evidence, and that plaintiff's petition should be dismissed. *Blasser v. Moats*, 460.

62. *Alteration of written instrument.* The plaintiff, having commenced this action to foreclose a mortgage, the mortgagor answered admitting his signature to the instrument, but alleging that since its execution the property description therein had been altered so that it covered sixty acres of land instead of twenty, and that the additional forty acres constituted his homestead. These allegations were supported by the testimony of the mortgagor

and his son, but the loan agent, who drew up the mortgage, testified that it was originally drawn to cover the sixty acres, and that he refused to make the loan on the twenty acres. Among other circumstances corroborative of the loan agent's testimony was the fact that the twenty acres was insufficient security for the loan made. *Held*, that the burden of proof being upon the mortgagor the charge of alteration was not established. *Potter v. Kennelly*, 96.

63. *Assignment of judgment.* Where the assignment of a judgment has been made a part of the record of the court, a certified copy thereof is competent evidence in an action on the judgment in a foreign court, the same as other parts of the record. *Coughran v. Gilman*, 442.

64. *Conspiracy—declarations of coconspirators—foundation.* On the trial of one of several defendants for murder, where it was claimed that the crime was the result of a conspiracy between them, *held* that, before the declarations of a codefendant could be admitted in evidence, it must be shown *prima facie*, to the satisfaction of the judge, that a conspiracy in fact existed, although the question of its existence must finally be submitted to the jury. *State v. McGee*, 17.

65. *Damages—expenses of physician.* The plaintiff testified that he had paid a physician named five dollars, while the physician testified that he did not know whether the money received was for services rendered the plaintiff or other members of his family. *Held*, that whether the sum named was paid by plaintiff on account of the injury sustained by him through defendant's negligence, was a question for the jury to decide. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267.

66. *Damages—Carlisle life tables—evidence conflicting as to permanency of injury.* Where in an action to recover damages for a personal injury the evidence is conflicting as to the permanency of the injury sustained, the Carlisle life tables may properly be received in evidence for the consideration of the jury in case they find the injury to be permanent. *Blair v. Madison County*, 313.

67. *Embezzlement—variance.* Where an indictment for embezzlement is based upon the employment of one as agent for the sale of certain personal property to a person named, proof on the part of the state, of authority to sell to any person, is not such a variance as will support a motion for verdict in favor of the defendant. *State v. Foley*, 36.

68. *Incest—corroboration of prosecutrix.* The sufficiency of corroborating evidence in such cases is for the jury to determine. *State v. Moore*, 578.

EVIDENCE. PROOF OF PARTICULAR ISSUES. *Continued.*

69. *Intoxicating liquors—sale of to husband—action by wife—damages.* In an action by a married woman against a saloon keeper for damages on account of the sale of intoxicating liquors to her husband, proof of having furnished intoxicating liquors to the husband upon the order and promise of payment by a third person is sufficient to sustain the action. *Judge v. Jordan*, 519.

70. *Liquor nuisance—instruction.* In a prosecution for maintaining a nuisance by selling intoxicating liquors upon certain premises described in the indictment, it appeared that the defendant, upon receipt of money therefor, issued orders for such liquors at his blacksmith shop, which were inclosed, with the money received, in an envelope, which being presented at a depot two blocks away the purchaser would receive the liquors called for by the order. *Held*, that, in view of the above evidence, an instruction to the jury, that if they found that the defendant "gave to any person any order by means of which he procured liquors of the character described in the indictment from the express office, or any other building, and that he received the money for such liquor at his blacksmith shop, substantially as charged in the indictment, this will be evidence that you may consider in determining, whether or not the defendant is guilty," was not erroneous, *State v. Briggs*, 585.

71. *Negligence—fire—circumstantial evidence.* In an action against a railroad company to recover for the loss by fire of certain household goods situated in a house located four hundred and twenty-one feet from defendant's right of way, after proof that, shortly before the fire, one of defendant's engines had passed along its road, that a pile of lumber on its right of way had been set on fire, and that a hard wind was blowing at the time from the lumber pile toward the plaintiff's house, the plaintiff introduced evidence against defendant's objection, that charred shingles after the fire and on the same day, were found a quarter of a mile beyond the plaintiff's house, and in the direction the wind was blowing. *Held*, that the evidence was admissible as tending to show the source of the fire whereby plaintiff's property was destroyed, and that an instruction, asked by defendant, that from the facts proven no inference could be drawn as to the source of the fire, was rightly rejected. *Knight v. C., R. I. & P. Ry. Co.*, 310.

72. *Negligence—fire—circumstantial evidence.* The evidence showed that large cinders of the size of a hickory nut were thrown from the smokestack of defendant's engine, and that the spark-arrester of such engine to permit the escape of such cinders must have been out of repair. *Held*, that the evidence warranted the inference that defendant's employes, who operated the engine had knowledge that the spark-arrester was out of repair, and that such knowledge would support a finding that the defendant was negligent. *Knight v. C., R. I. & P. Ry. Co.*, 310.

EVIDENCE. PROOF OF PARTICULAR ISSUES. *Continued.*

73. *Negligence—railroad crossing—signals.* The defendant's witnesses testified that signal lights were displayed at the crossing, and the bell on the engine was rung as it approached the same. The plaintiff, on the other hand, testified that he did not see the lights nor hear the bell. *Held*, that if the plaintiff was in a position to hear the bell if rung, and see the lights if displayed, and he was listening and looking for that purpose, there was such a conflict in the testimony as to require the submission of the question to the jury. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267.

74. *Title by prescription—highway.* The failure of the public to assert any right to a strip of land over which a public highway had been established for nearly thirty years, and the continued and adverse use and occupation of the same by the plaintiff and his grantors, in good faith, for nearly that length of time, *held*, sufficient to vest a title to such land in the plaintiff by prescription, although the person originally taking possession thereof had knowledge of a road having been established thereon. *Smith v. Gorrell*, 218.

SUFFICIENCY TO SUSTAIN VERDICT IN PARTICULAR CASES.

75. *Alibi—conflict.* The evidence on the defense of *alibi* in this case is considered, and *held* to be conflicting, and hence no reason for reversing a judgment of conviction on the ground that an *alibi* was proved. *State v. Sipult*, 40.

76. *Burglary—testimony of accused.* The defendants, three in number, were jointly indicted for burglary of goods in a storeroom. The person in charge of the store testified that the door of the store was shut and latched, and that defendants entered by raising the latch; while the defendants all testified that the door was open when they entered. *Held*, that the finding of the jury against the defendants cannot be said to be without justification. *State v. O'Brien*, 93.

77. *Burglary—identity of person—evidence.* The defendant was brought from the state of Ohio to Appanoose county, Iowa, to answer an indictment for the theft of two horses, found against one Foster five years previous, and who had jumped his bail. In defense, he claimed that his name was Jared Hickey, and that, at the time of the commission of the offense alleged, he resided near Coldwater, Michigan. Twenty-two out of twenty-three witnesses, called by the state, testified that defendant was the identical man who had been found in the possession of the horses, and was arrested and lodged in jail five years before for the offense charged. Seven persons, among whem was the sheriff who made the former arrest, and the jailer then in charge of the jail, testified that defendant was not the man formerly arrested for the same offense. *Held*, that a verdict finding defendant guilty was sufficiently supported by the evidence. *State v. Foster*, 181.

EVIDENCE.

SUFFICENCY TO SUSTAIN VERDICT IN PARTICULAR CASES. *Continued.*

78. *Embezzlement.* After the board of supervisors had made demand upon the defendant for a settlement of his accounts as treasurer, and time had been given him to write up his books, and he had been urged by the board from time to time to produce the money that should be in his custody, the defendant tendered some money and bank drafts necessary to make up the amount, but the board refused to receive the drafts as money, and again defendant produced the proper amount of money, but the board refused to settle with him, because he demanded that the money be immediately returned to him. When defendant was finally removed from office, he was found to be in default in the sum of over twenty thousand dollars, and no explanation of the defalcation was made upon the trial. *Held*, that the charge of embezzlement was supported by the evidence. *State v. King*, 537.

79. *Murder in second degree.* The evidence in this case reviewed, and *held* to support a verdict of murder in the second degree. *State v. Murdy*, 603.

80. *Murder — circumstantial evidence.* The deceased, with whose murder the defendant was charged, was found in his office fatally wounded from a pistol shot, the wound and burned condition of the nose and eyelashes indicating that the pistol when discharged must have been placed with the muzzle against the face and under the eyebrow, and the situation of the revolver being such as it might naturally have been if discharged by the deceased himself. But two shots were fired, being about four and one-half seconds apart, both of which were from the revolver found by the side of the deceased; and but two balls were ever discovered, one in the head of the deceased, and the other in the back of defendant. The deceased was a man of good physique, in the vigor of his physical manhood, and capable of preventing a deadly assault with a revolver placed against his face. *Held*, that the undisputed facts in the case being inconsistent with murder, but consistent with suicide, the burden was upon the state to overcome the presumptions arising from such facts with affirmative proof of the guilt of the defendant, and that, the state having failed to do this, a verdict of murder in the second degree was erroneous. *State v. Billings*, 99.

81. *Personal injury—cause.* There was no direct evidence that the foot of the deceased was caught in the switch, and was the cause of his fall, but his shoe worn at the time was introduced in evidence, and presented a wrenched appearance. *Held*, that this evidence, considered in connection with the circumstances under which the accident occurred, was sufficient to support a finding that the deceased fell through having his foot so caught. *Brooks v. C., R. I. & P. Ry. Co.*, 504.

EVIDENCE. *Continued.*

ERROR WITHOUT PREJUDICE.

82. *Declarations—rape.* The testimony of a witness, upon a prosecution for rape, that the subject of the rape "told her the whole circumstance," but not relating the circumstances, is error without prejudice. *State v. Watson.* 380.

83. *Erroneous exclusion of testimony.* The exclusion by the court of competent testimony of a witness, the substance of which has previously been given by him in evidence, and permitted to remain in the record, is error without prejudice. *Sprague v. Atlee,* 1.

84. *Embezzlement by county treasurer.* The introduction of the record by the board of supervisors in such case to show the report of the defendant as treasurer, *held,* to be without prejudice, when the report itself was afterwards introduced in evidence. *State v. King,* 587.

85. *Indictment for—conviction for manslaughter—conspiracy.* Where a trial upon an indictment for murder results in a verdict against defendant for manslaughter only, evidence introduced by the state in proof of a conspiracy to commit murder, and of declarations and admissions made by the coconspirators, and the instructions of the court to the jury in relation thereto, if erroneous at all, will be deemed error without prejudice, as, in acquitting the defendant of the charge of murder, the jury must have found in his favor on the question of the alleged conspiracy. *State v. Row,* 188.

86. *Murder—defendant's reputation.* On a trial for murder, after a witness for defendant had testified that his reputation for being a quiet and peaceable citizen was good, it is error to allow him, on cross-examination, to be interrogated as to his participation in particular quarrels. But where the answers were all favorable to the defendant, the error is no ground for complaint on his part. *State v. McGee,* 17.

EXECUTION.

PROPERTY LIABLE TO.

1. *Possession—recording—notice.* A son purchased, with money loaned him by his father, a one-half interest in a stock of merchandise. Afterwards, by written agreement, he relinquished all interest in the property to the father, but providing that he should continue to conduct the business, and should become owner of one-half of the same when payment of an amount stated should be made. This agreement was not recorded, and the son continued in possession of the property. An execution having been

EXECUTION. PROPERTY LIABLE TO. *Continued.*

levied upon the property to satisfy a judgment against the son, the father sought to recover the same by replevin. *Held*, that, in the absence of actual knowledge of the above agreement before the levy, one-half of the interest in the property was subject to the execution. *McIntosh v. Wilson*, 339.

2. *Pharmacy law—evasion—estoppel.* Where the owner of a stock of merchandise transferred the same to another, to be held and treated by him as its ostensible owner, for the purpose of evading the law relating to registered pharmacists, and the property is levied upon under execution as that of the person so in possession, the real owner will be estopped from claiming any title thereto. *Id.*

PROPERTY EXEMPT.

8. *Pension money—property purchased therewith.* Real estate purchased by a pensioner with pension money, received from the federal government, is exempt from levy and sale under execution, under the provisions of section 4747 of the Revised Statutes of the United States. (*Overruling prior decisions.*) [ROBINSON, J., *dissenting.*] *Crow v. Brown*, 344, *Dean v. Clark*, 753.

LEVY.

4. *Stock in corporation—method.* Under sections 2967 (subd. 3) and 3050 of the Code, an execution can be levied upon stocks in a corporation only by notifying the president, or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been levied upon; and such notice must be in writing. Mere oral notice, with a writing upon the back of the stub of the certificates in the stock book, is not sufficient. *Moore v. Marshalltown Opera House Co.*, 45.

CONFLICTING CLAIMS.

5. *Prior transfer of stock in corporation—sufficiency.* Under section 1078 of the Code, which provides that a transfer of shares in a corporation is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, *held* that an entry by the secretary of the company, in the stock book, that the shares had been assigned as collateral security, was sufficient to defeat a subsequent levy of an execution upon them by the creditors of the assignor. *Id.*

SALE.

6. *Sale of lands en masse—setting aside—appeal.* Where lands have been offered upon execution sale in separate tracts pursuant to the requirements of notices given to the sheriff by defendant, as contemplated by section 3088 of the Code, and no bids are received, a sale *en masse* is not *per se* void or voidable, though the several tracts are not contiguous. *Conn. Mut. Life Ins. Co. v. Brown.*

See Judgment, 2, 3; Judicial Sale.

EXEMPTION.

OF PROPERTY FROM EXECUTION. See Execution, 8. OF ASSIGNMENT OF EXEMPT PROPERTY. See Assignment for Benefit of Creditors, 1.

EX POST FACTO LAWS. See Constitutional Law.

FORMER ADJUDICATION.

AS TO WHAT MATTERS CONCLUSIVE.

1. *An adjudication* is not conclusive as to matters not in issue unless they are incident to, or essentially connected with, the subject-matter of such adjudication. *Donahue v. McCosh*, 296.

2. *Action on specific portions of contract.* An adjudication as to the proper construction of specific provisions of a contract will not bar a subsequent action between the same parties involving claims under other provisions of the same contract, and charges of omissions or undervaluations of property therein referred to through fraud, accident or mistake, though a pleading presenting the same questions was filed in the former action, but, with leave of court, withdrawn without prejudice before trial. *Id.*

AGAINST WHOM CONCLUSIVE.

3. *Mortgage—foreclosure—decree.* Where in a suit for the foreclosure of a mortgage an issue is presented involving the rights of all parties having or claiming any interest in the property claimed under the mortgage, the determination of such issue by a court of competent jurisdiction is conclusive upon one who was then a mere general creditor of the mortgagor. *Omaha, etc., Ry. Co. v. O'Neill*, 463.

WHO MAY PLEAD.

4. *Plea by husband on behalf of wife.* A husband, against whom a decree of foreclosure of a mortgage on real estate has been duly obtained, cannot, in an action of forcible entry and detainer to recover possession after the period of redemption, set up the defense that his wife, who was not a party to the former suit, has a homestead interest in the mortgaged premises; such fact, if a defense at all, being available in the former suit, must be deemed to have been adjudicated or waived. *Dodd v. Scott*, 319.

FRAUD.

INADEQUATE CONSIDERATION.

1. *Contract—subscription to stock in corporation.* The defendant, being the owner of a silver mine in Arizona, prospected the same to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet, resulting in a find of a small vein of silver ore. He thereupon organized a stock company in Iowa to operate said mine, with a capital stock of five hundred

FRAUD. INADEQUATE CONSIDERATION. *Continued.*

thousand dollars. In consideration of seventy thousand dollars' worth of such stock the plaintiff agreed to pay defendant seventeen hundred and fifty dollars, or convey to him certain real estate. *Held*, that the contract was not without consideration, nor was the consideration so inadequate as to constitute a badge of fraud. *Coles v. Kennedy*, 360.

MISREPRESENTATION.

2. *Subscription to stock in corporation.* The representation by a promoter of a corporation to one, as an inducement to his subscription to the capital stock in such corporation, that a person named, of wide reputation for his sagacity in business affairs, had agreed to subscribe for a large amount of the same stock without disclosing the fact that said stock was given such person as a gratuity for the use of his name, is such a fraud as will entitle one who has subscribed for stock upon the faith of such representation to have his contract of subscription canceled in a court of equity. *Id.*

TRANSACTIONS BETWEEN RELATIVES.

3. *Husband conducting business in wife's name.* An insolvent husband cannot by procuring a loan of money to be made upon his wife's obligation, and conducting business therewith in her name, protect the results of his industry and skill from the claims of his creditors, *Hamill & Co. v. Augustine*, 302.

4. *Redemption of property by father-in-law—conveyance to debtor's wife.* The fact that said certificate of sale was purchased by the father-in-law of the judgment debtor, who subsequently conveyed the property to the debtor's wife, while casting some suspicion on the transaction, is not sufficient to show that such purchase was fraudulent, and in fact a redemption of the land with the debtor's money, against the direct and positive testimony of the debtor in support of the good faith of the transaction. *Austin v. Bowman Bros.*, 277.

5. *Badges of fraud.* The fact that a purchaser of the property from such debtor's wife took security against the lien of defendant's judgment, and other clouds upon the title, is no proof of fraud, nor will equity require him to abandon his title to the property, and seek to recover upon his security. *Id.*

See Limitation of Actions, 1.

FRAUDULENT CONVEYANCES.

TRANSACTIONS BETWEEN RELATIVES.

1. *Conveyance to wife—creditors.* A judgment is not a lien upon the homestead of the judgment debtor, and the latter's conveyance of such property to his wife will not be deemed fraudulent as to the judgment creditor. *Beyer v. Thoeming*, 517.

FRAUDULENT CONVEYANCES.

TRANSACTIONS BETWEEN RELATIVES. *Continued.*

2. *Negotiable paper—notice.* A conveyance of real estate by an insolvent debtor to one of his sons in consideration of his promissory note for the purchase price, which note is transferred by the father before maturity to another son, will, in the absence of evidence that the holder of the note paid value therefor, be deemed fraudulent and void as to existing creditors. *Douglas v. Hannah*, 469.

3. *Intention—presumption.* In such an action an instruction that "it is lawful for a man to deal with his friends and relations, and that the presumption of law is that such dealings are fair and honest, without any fraudulent intent, and that no presumption of fraud attaches to such dealings," is not erroneous. *Allen v. Kirk*, 658.

TRANSFER IN CONTEMPLATION OF ONE'S DECEASE.

4. *Valid, except as against creditors.* A transfer of personal property in contemplation of one's approaching decease will not be disturbed in the absence of any showing that there are debts due from the estate of the grantor. *In re Estate of Hoffman*, 292.

PARTNERSHIP PROPERTY.

5. *Conveyance for debt of individual partner.* A conveyance of partnership property in payment in part of the firm indebtedness, and in part of the indebtedness of one of the partners, without the consent of all the partners, is void to the extent of the indebtedness of the individual partner, and may be attacked by a creditor of the firm. *Newell & Co. v. Martin et al.*, 238.

INTENTION OF GRANTOR.

6. *Mistaken belief as to law.* The belief of an insolvent in the execution of a general assignment, that he will thereby be absolved from all further obligation to his creditors, will not affect the validity of the deed if made according to law. *Bradley v. Bischel*, 80.

TITLE OF VENDEE.

7. *Good faith—notice.* The goods in question having been taken from the plaintiff, under a writ of attachment against the property of her vendor, the jury was instructed that, if the plaintiff purchased for value before the levy, she was entitled to recover therefor, "unless they further found" that the purchase was not in good faith, or that she had notice that her vendor intended to defraud his creditors, or that she had knowledge of facts which should have put her on inquiry, and that would have led to that knowledge, or that she purchased in pursuance of a conspiracy to defraud the creditors of her vendor. *Held*, that instruction was proper. *Allen v. Kirk*, 658.

FRAUDULENT CONVEYANCES.

EVIDENCE.

8. *Proof of ability to pay.* Evidence that, some time prior to the date of the sale in question, the vendee offered twenty-five hundred dollars for a house, and at the time had a large package of money in her hand, *held*, competent as showing the vendee's ability to pay for the goods purchased. *Id.*

9. *Proof of payment—instructions.* The defendant asked that the jury be instructed that, if plaintiff 's vendor was insolvent, and made the sale in question to defraud his creditors, "and the sale is surrounded with suspicious circumstances in other respects," it is incumbent upon the plaintiff to show, by competent evidence, satisfactory to the jury, that she paid for the stock of goods as claimed by her; and that the ease and facility with which a fictitious payment may be fabricated require that she produce all the proof which may reasonably be supposed to be in her power of the reality and fairness of the transaction, and that the want of clear proof in this regard, and without any satisfactory explanation as to where the money which she claimed to have paid came from, and how it was obtained, is evidence of fraud, and it is not sufficient that the plaintiff merely make proof of payment, but she must give a reasonable explanation as to where the money came from, and how it was obtained, which she claims to have paid for the stock, as such proof is within her knowledge and power. *Held*, that the instruction called for more than a preponderance of the evidence to establish payment, and was rightly refused. *Id.*

10. *Fraud—cross-examination.* While in an action involving the validity of a sale of personal property, alleged to have been made to defraud creditors, a wide latitude should be allowed in the cross-examination of the parties thereto, yet, where the record shows an extended cross-examination of a party, the cause will not be reversed because certain questions, pertaining to matters of an incidental or immaterial nature, or which were covered by previous inquiries, were not permitted. *Id.*

CONSPIRACY TO DEFRAUD.

11. *Declarations of vendor.* In such an action, the declarations of the vendor, made under oath, in relation to transactions between him and the vendee, but in the absence of the latter, and after the consummation of the sale, are not admissible in evidence as against the vendee, even under an issue as to a conspiracy between the parties in such transaction to defraud creditors. *Id.*

12. *Declarations of coconspirators as evidence.* The court instructed the jury "that no evidence of anything said, done or written by the plaintiff 's vendor, or the other alleged coconspirators, could be considered against the plaintiff," unless they found that she had entered into said conspiracy, and that what was said

FRAUDULENT CONVEYANCES.

CONSPIRACY TO DEFRAUD. *Continued.*

or done was in furtherance of the common design. *Held*, that, in view of the subject of the instruction, it was not to be construed as excluding from the consideration of the jury acts and declarations of the persons named which would be competent as part of the *res gestæ*, though no conspiracy existed. *Id.*

INTEREST REMAINING IN GRANTOR.

13. *Husband and wife—homestead.* Where one makes a conveyance of real estate without consideration, and presumably in fraud of creditors, and under agreement for a reconveyance thereof when requested, he retains no such interest therein, as, upon his subsequent marriage, and occupancy of the premises with his family, will enable the wife to acquire a homestead interest in said property as against said grantor's individual conveyance thereof in pursuance of a power of attorney from the grantee under said fraudulent conveyance. *Johnston v. McPherran et al.*, 230.

FREIGHT. See Common Carrier, 1.

GRAND JURY.

MINUTES OF PROCEEDINGS AS EVIDENCE. See Evidence.

IDENTITY.

OF PERSONS. See Larceny.

INCEST.

CORROBORATION OF PROSECUTRIX.

The sufficiency of corroborating evidence in a prosecution for incest is for the jury to determine. *State v. Moore*, 578.

See Evidence.

INDICTMENT.

SUFFICIENCY OF.

1. *Matter of defense not alleged.* An indictment for the crime of adultery may be good although it does not show that the prosecution was commenced upon the complaint of the husband or wife of the accused, nor that the latter is unmarried. If the defendant in such case is married, that fact should be pleaded as a defense. *State v. Mahan*, 121.

2. *Matter of defense not alleged.* Where, in an indictment for libel, the libeous matter therein alleged to have been published by the defendant is sufficient to constitute the offense, it is not necessary that the indictment negative facts which are mere matters of defense, *State v. Conable*, 60.

INDICTMENT. SUFFICIENCY OF. *Continued.*

3. *Allegations of ownership—burglary.* An indictment which charges one with burglariously breaking and entering "a certain store of one W. W. Doolittle," sufficiently alleges the ownership of said premises. *State v. O'Brien*, 93.

4. *Allegations of ownership—trespass.* In an indictment for trespass an allegation, that the land described belonged to the "Estate and heirs of Madison Young, deceased," sufficiently alleges the ownership of said land. *State v. Paul*, 596.

DUPLICITY.

5. *Trespass.* An indictment for trespass which alleges that the accused both cut *and* carried away trees from land therein described, is not subject to the charge of duplicity, under Code, section 3983, if the cutting and carrying away were parts of the same transaction. *State v. Paul*, 596.

6. *Trespass on several tracts of land.* An indictment for trespass that charged the accused with cutting down and carrying away growing trees from two separate tracts of land, the property of persons named, is not bad as charging two separate offenses, if the cutting upon both tracts was a single transaction. *Id.*

7. *Embezzlement.* An indictment charging one with embezzlement of public funds, received by him as county treasurer, "by expending the same in his private business, and by permitting persons, whose names are to the grand jury unknown, to use and expend said money in their private business transactions, and by using said money to pay his own private debts," is not bad for duplicity, as charging three distinct offenses, nor is it ambiguous because the amount appropriated by each of the methods of the conversion is not stated, but the matter so alleged is mere surplusage. *State v. King*, 587.

SURPLUSAGE. See Embezzlement.

VARIANCE IN PROOF. See Adultery, 2; Burglary, 2; Embezzlement.

INFORMATION.

SUFFICIENCY OF.

Sale of compound lard. An information charging a person with selling a bucket or package filled with an article intended for use as lard, which contained other ingredients than the pure fat of healthy swine, and which bucket or package did not bear on the top or outer side thereof the name and proportion, in pounds and fractional parts, of each ingredient contained therein, sufficiently charges an offense under the statute. *State v. Snow*, 642.

INJUNCTION.

WHAT MAY BE ENJOINED.

1. *Water right—removing ice from.* Where a mill-owner owns the water in a river flowing over the land of an adjoining owner, the removal of ice from the river at such point, under license from such adjoining owner, is not such an infringement of the mill-owner's rights as, in the absence of proof of substantial injury therefrom, will entitle him to an injunction. *Lathrop v. Haley*, 649.

2. *Against enforcing judgment against land.* Pending an action to foreclose a mortgage upon certain real estate, the defendants obtained a judgment against one of the owners thereof. After decree in the foreclosure proceeding, the property was sold on special execution, and a sheriff's deed in due time was issued to the assignee of the holder of the certificate of sale. *Held*, that the mortgage being a prior and paramount lien the foreclosure and sale thereunder operated to pass the title to said property to said purchaser clear of the lien of defendants' judgment, and defendants were properly enjoined from seeking to enforce the same against the property on execution. *Austin v. Bowman*, 277.

DAMAGES.

3. *Action on bond--pleading.* A petition in an action for damages on an injunction bond alleged that the defendant caused an injunction to be issued restraining plaintiff from trespassing on certain real estate; that plaintiff was put to great trouble and expense in defending against the wrongful issuance of said injunction, and in obtaining its dissolution, including an attorney's fee of fifty dollars, and twenty days of his own time; but not stating upon what ground the injunction was issued, nor upon what ground it was dissolved, nor that plaintiff was thereby prevented from the exercise and enjoyment of some substantial right to which he was entitled, is bad on demurrer. *Hibbs v. Western Land Co.*, 285.

INSTRUCTIONS TO JURY.

MUST BE IN WRITING.

1. *The defendant was indicted* for an assault with intent to commit murder. After the jury had deliberated upon their verdict, they returned into court and requested further instructions. Thereupon the court questioned the jurors as to their points of difference, and orally instructed them as to the difference between an assault with intent to commit murder and an assault with intent to commit manslaughter; which instructions were taken down in shorthand by the reporter, and, upon the notes being extended, were delivered to the jury. Before the jury received said instructions in writing, however, they had agreed upon a verdict, but were directed to wait for the written instructions. After the

instructions were received in writing by the jury, and after the same had been read, a vote was taken, and the verdict previously found adhered to. *Held*, that the action of the court was contrary to the provisions of Code, sections 4420, 4440 and 4441, requiring that instructions to the jury in criminal cases be in writing. *State v. Harding*, 599.

SCOPE OF.

2. *Framed with reference to issues and evidence.* A party is not entitled to have a jury instructed as to the law applicable to an issue upon which no evidence has been introduced. *State v. Watson*, 380; *Brooke v. C., R. I. & P. Ry. Co.*, 504; *Judge v. Jordan*, 519.

3. *Framed with reference to issues and evidence.* It is proper for a court to refuse to give an instruction to a jury which is not applicable to the case under the evidence, though correctly stating a rule of law. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267; *Judge v. Jordan*, 519.

4. *Framed with relation to issues and evidence.* An instruction that certain evidence is insufficient to establish a fact in issue may be properly refused when such evidence, taken in connection with other evidence in the case, tends to prove such fact, and the instruction is calculated to mislead the jury. *Fish v. Chicago, R. I. & P. Ry. Co.*, 280.

5. *Omission of reference to parts of evidence.* An instruction which charges the jury to consider and weigh all the testimony and circumstances bearing upon the issues in the case, and then calls special attention to various branches of the evidence, but omits reference to certain important portions of defendant's evidence, is not objectionable as limiting the evidence to be considered by the jury. *State v. Watson*, 380.

6. *Party must ask more specific instructions if desired.* When the instructions of a court to the jury correctly present the propositions of law applicable to the questions at issue, a party who has not asked that the jury be more fully instructed cannot complain upon appeal that more elaborate instructions were not given. *Churchill v. Gronewig et al.*, 449; *State v. Watson*, 380; *State v. Illsley*, 49.

7. *Framed with reference to issues and evidence.* An instruction which submits to a jury for its finding a question of fact claimed to constitute a defense to plaintiff's cause of action, if erroneous at all, will be regarded as error without prejudice as against a defendant who, by his pleading, has already waived his right to insist on such defense. *Linden v. Green*, 365.

INSTRUCTIONS TO JURY. *Continued.*

REPETITION.

8. *The refusal of the trial court* to give to the jury an instruction asked, the substance of which is embodied in other instructions given by the court, is not erroneous. *Blair v. Madison County*, 313; *Knight v. Chicago, R. I. & P. Ry. Co.*, 310.

VERDICT.

9. *Must follow instructions.* A verdict of a jury that has been found against an instruction of the court will be set aside, even though such instruction contain an erroneous statement of the law. *State v. Moore*, 578.

CONSTRUED.

10. *Statement in clear and concise language—liquor nuisance—evidence of illegal sales.* In a prosecution for liquor nuisance, the court instructed that the finding of intoxicating liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling-house which does not include, or is not used in connection with, a tavern, public eating-house, restaurant, grocery, or other places of public resort, is presumptive evidence that such liquors were kept for illegal sale, and that proof of actual sale is presumptive evidence of illegal sale. *Held*, not subject to the objection that it does not state the law in clear and concise language. *State v. Illsley*, 49.

11. *Length of charge—calling attention to youth of plaintiff.* Great length in the instructions of the court to the jury, and the frequent use therein of terms calling the attention of the jury to the youth and inexperience of the plaintiff, will not constitute grounds for reversal upon appeal, where there is nothing to indicate in the record that the defendant was prejudiced thereby. *Sprague v. Atlee*, 1.

12. *Paragraph erroneous, but correct as a whole.* A judgment will not be reversed by the supreme court because a single paragraph of the trial court's charge to the jury, when taken alone, is susceptible to the interpretation of an erroneous statement of the law, when the language of such paragraph is elsewhere properly modified and explained, and the charge taken as a whole correctly presents the law to the jury. *Fish v. Chicago, R. I. & P. Ry. Co.*, 280.

13. *Withdrawing issues from jury.* The defendants plead an estoppel to plaintiff's claim for rent based upon an agreement alleged to have been made prior to their vacation of the leased premises, and introduced evidence of statements made by plaintiff on the basis of such agreement, and tending to prove an estoppel. *Held*, that, as the jury must have found that the alleged agreement was not in fact made, an instruction withdrawing the issue of an estoppel from the jury was not erroneous. *Churchill v. Gronewig et al.*, 449.

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

14. *Witness—credibility.* An instruction to a jury, that if they found that a witness had testified falsely as to material matters, knowingly and intentionally, they *might* disregard his testimony altogether, is not erroneous. *Judge v. Jordan*, 519.

15. *Verdict based on erroneous instruction—error not warranting reversal.* A judgment will not be reversed in the supreme court because of an erroneous instruction to the jury, when such judgment was demanded under the evidence and other instructions correctly given; even though the verdict of the jury may have been based upon the erroneous instruction. *Newell & Co. v. Martin et al.*, 238.

16. *Weight given by jury—admissions.* An instruction that, as a general rule, the statements of a witness, as to verbal admissions of a party, should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake, is proper. *Allen v. Kirk*, 658.

17. *Fraudulent conveyance—relationship of parties.* In an action attacking a sale of personal property as fraudulent, an instruction that "it is lawful for a man to deal with his friends and relations, and that the presumption of law is that such dealings are fair and honest, without any fraudulent intent, and that no presumption of fraud attaches to such dealings," is not erroneous. *Id.*

18. *Conspiracy—declarations of coconspirators.* An instruction with reference to each conspirator being bound by the acts of the other further stated that the jury must find that the conspiracy existed as alleged, that the plaintiff was a party thereto, and that the acts and declarations of the conspirators must have been in furtherance of a common design, on the part of plaintiff and the other alleged conspirators, to defraud the creditors of plaintiff's vendor. *Held*, not subject to the objection that it bound the plaintiff by acts and declarations made only after she joined the conspiracy. *Id.*

19. *Railroad switch—charge as to degree of repair required.* An instruction to the jury that they should "determine whether or not the switch was properly constructed; that is to say, whether it was in perfect order or repair;" that "the defendant was bound to exercise ordinary care in keeping the switch in a reasonably safe condition, having regard to the safety of its employes," *held*, not objectionable as fixing, as a matter of law, the degree of order or repair that such a switch should be kept in to be reasonably safe for the use intended. *Brooke v. C., R. I & P. Ry. Co.*, 504.

20. *Contributory negligence.* In an action for damages for a personal injury sustained through the alleged negligence of another, an instruction to the jury that, to entitle the plaintiff to

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

recover, he must show himself to have been free from negligence that *proximately* contributed to the injury, is not improper. *Theissen v. City of Belle Plaine*, 118.

21. *Murder—self-defense—use of word courageous.* An instruction to a jury upon the issue of self-defense in a prosecution for murder, that, in determining whether the defendant was justified in using a dangerous weapon in self-defense, the inquiry is "whether, from all the attendant and surrounding circumstances at the time of the conflict, it reasonably appeared to defendant, as a reasonable, prudent, courageous and cautious man, that he was about to suffer death or great bodily harm" at the hands of the deceased, while not accurate according to a strict construction of the language used, yet it will not be deemed a reversible error when the rule applicable to self-defense is correctly stated in several other paragraphs of the court's charge, and it is apparent that the court intended to qualify the word "courageous" by the word "reasonably." *State v. Shreves*, 615.

22. *Murder—self-defense.* An instruction that if defendant went to the shop of deceased with a view to provoking a quarrel he could not avail himself of the plea of self-defense, if he killed deceased in the difficulty thus sought by him, "though such killing may have become necessary to preserve defendant's life, or his person, from an imminent and enormous injury," but that he would be guilty of either murder or manslaughter; *held*, that, in view of the evidence, the instruction was not improper. *State v. Murdy*, 603.

23. *Murder—homicide undisputed—omission to instruct as to mere assault.* An instruction to a jury that under an indictment for the crime of murder, if the evidence was sufficient, the defendant could be convicted of murder of the first or second degree, or of manslaughter, without an instruction that there might be a conviction for an assault with intent to commit a crime, or for a simple assault, is not erroneous in a case where the fact of homicide is undisputed, and the defendant, if guilty of any crime under the evidence, is guilty of murder or manslaughter. *State v. Row*, 138.

24. *Murder—manslaughter—charge in different paragraphs.* One paragraph of the court's charge instructed the jury that, if they failed to find that the defendant fired the shot in question "wilfully, deliberately and premeditatedly," they should find him "guilty only of murder in the second degree." This paragraph was preceded by an instruction as to the facts necessary to constitute the crime of murder in the first degree, and was immediately followed by instruction that, if they failed to find the defendant guilty of murder in either the first or second degree, they should

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

then determine whether he was guilty of manslaughter, and proceed to define that crime. *Held*, that considering the whole charge together the paragraph complained of could not have resulted in prejudice to the defendant. *State v. Murdy*, 603.

25. *Alibi as a defense—degree of proof.* On the question of *alibi* the court was asked to instruct as follows: "You should indulge no prejudice against an *alibi* as a defense, for the reason that, if it is clearly established by intelligent and reliable witnesses, it is a legal and complete defense." *Held* that it was properly refused, because, *first*, it was not necessary to give the implied warning, and, *second*, it is not necessary to acquittal that an *alibi* be clearly established,—a preponderance of the evidence being sufficient. *State v. Sipult*, 40.

26. *Rape—corroborative evidence.* The fact that the evidence submitted to a jury in an instruction as proper for their consideration in determining the question, whether the testimony of the prosecutrix in a prosecution for rape is corroborated in the manner that the law requires, is not such corroborative evidence, will not constitute the giving of such instruction a reversible error, when the record shows there was other evidence, not referred to in said instruction, that is in fact corroborative. *State v. Watson*, 380.

EXCEPTIONS TO.

27. *Practice.* The error of the trial court in failing to write the word "given" upon the margin of instructions asked, and given to the jury, is not available on appeal to a party who took no exception to such omission in the court below. *Knight v. C., R. I. & P. Ry. Co.*, 310.

28. *Practice—appeal.* Where the statement of the issues in a cause prepared by the court for the jury was submitted to the attorneys for defendant, and approved by them, the defendant cannot be heard to complain upon appeal that the portion of his defense set out in an amendment to the answer was not submitted to the jury. *Sprague v. Atlee*, 1.

ASSIGNMENT OF ERROR.

29. *Directed to whole charge—complaint of single instruction.* A general assignment of error directed to the court's charge to the jury as a whole, without specifying the particular errors complained of, will not entitle a party to have considered the error contained in any single instruction. *Blair v. Madison County*, 313.

INSURANCE (FIRE).

AGENT.

1. *Knowledge of excessive insurance—waiver.* Where the agent of a fire insurance company, at the time of accepting an application for insurance, has knowledge of the existence of an amount of

insurance on the property to be insured in excess of that allowed under a condition in the policy issued on such application, the company will be presumed to have waived such condition; and like knowledge on the part of the insured will not prevent his recovery under such policy. *Hagan v. Merchants', etc., Ins. Co.*, 321.

2. *Power to bind company—unauthorized use of premises insured.* An agent of a fire insurance company employed to solicit risks, deliver policies and collect premiums, and having no authority to make contracts, cannot bind the company by his consent to an unauthorized use of the insured premises, nor waive a forfeiture of the policy resulting from a breach of its conditions. *Garretson v. Insurance Co.*, 727.

RISK.

3. *Policy—conditions—construction of phrase, any mercantile purpose.* Permission in a policy of fire insurance to use the insured premises for "any mercantile purpose" will not authorize their use as a restaurant. *Id.*

4. *Policy—conditions—construction.* The use of a corn-sheller, together with an engine and boiler for the purpose of propelling same, is within the meaning of a provision in a policy of insurance against fire, declaring that such policy will be rendered void if, without permission in writing thereon, "there be any change in the exposure, by the erection or occupation of adjacent buildings, or by any means whatever within the control and knowledge of the insured." *Davis v. Western Home Ins. Co.*, 496.

PREMIUM NOTE.

5. *Mutual companies—assessments.* No action can be maintained upon a promissory note given to secure the premium upon a policy of insurance in a mutual fire insurance company, and payable in installments on assessment by the directors of such company, when, up to the date of loss under said policy, no assessment against said insured has been made. *Hagan v. Merchants', etc., Ins. Co.*, 321.

PROOF OF LOSS.

6. *Parol evidence.* The form or sufficiency of the proof of loss made by plaintiff not being in issue, but simply the fact whether such proof had been made, *held*, that such fact might be established by parol, and no prejudice could arise from the introduction of secondary evidence of the notice served upon the defendant. *Id.*

7. *Admission—oral evidence.* After the introduction of oral evidence, against the objection of defendant, to the fact that a letter had been written the defendant concerning the policy in question, the proof of loss and payment thereunder, the plaintiff

INSURANCE (FIRE). PROOF OF LOSS. *Continued.*

offered in evidence a letter received from defendant's attorney, purporting to be in reply to the above, and stating the reason why payment of the policy was refused to be the taking out of additional insurance, and other irregularities, in violation of the policy, but making no objection to the sufficiency of proof of loss. *Held*, that parol evidence to the fact of plaintiff 's letter and its subject-matter was competent, and that the admission of defendant's reply, though not pertaining to a fact in issue, was error without prejudice. *Hagan v. Merchants', etc., Ins. Co.*, 321

INSURANCE (LIFE).

ASSIGNMENT.

1. *Policy.* Where a contract for insurance in a mutual benefit association authorizes a change in the beneficiary upon the direction of the insured, and neither the consent of the association nor the surrender of the benefit certificate is required either by the contract for insurance or by the constitution or by-laws of the association, a written instrument duly executed by the insured, and forwarded, at his instance, to the association by mail, reciting that he thereby surrenders the benefit certificate theretofore issued to him, and directing that a new certificate be issued to him, payable to a different beneficiary, will be effectual to change the beneficiary under said certificate, and will be binding upon the association after notice thereof, without the surrender of the certificate in fact, although it was the practice in the business of said association to require the surrender of benefit certificates in such cases before issuing new ones, and the association had neither issued a new certificate as directed, nor assented to the change of beneficiaries, before the death of the assured. (*Distinguishing Stephenson v. Stephenson*, 64 Iowa, 534.) *Hirschl v. Clark*, 200.

MUTUAL BENEFIT ASSOCIATIONS.

2. *Non-payment of dues—forfeiture.* A membership certificate in a mutual benefit association provided for the payment of two thousand dollars to the beneficiary therein named, upon the death of the member, upon the condition, among others, that the member was in good standing at the time of his decease, which, under the constitution of the association, included the payment of dues of not less than one dollar per year, and fifty cents a year per degree of benefit held. No dues being paid under this certificate, the member was suspended, and subsequently died. After the member's decease, the beneficiary paid to the collector of the local council the amount of the assessments and dues against the deceased, but the money so received was not paid to the council, and its receipt was unauthorized, and in violation of its constitution and by-laws. *Held*, that the association was not liable for the payment of the certificate. *Brown v. N. W. Legion of Honor*, 400.

INSURANCE (LIFE). *Continued.*

LIMITATION OF ACTION.

3. *Benefit certificate—maturity.* Under a clause in a certificate of insurance in a mutual benefit association limiting the time for action thereon to six months, after the death of the assured, the limitation will not commence to run until the cause of action on such certificate matures. *Matt v. Mut. Aid Ass'n of Ottumwa*, 135.

INTERMINGLING OF GOODS. See Property.

INTERVENTION. See Practice.

INTOXICATING LIQUORS.

GIFT OF, NOT UNLAWFUL.

1. *It is not unlawful* to give away intoxicating liquors to be used as a beverage. *State v. Briggs*, 585.

ILLEGAL SALE.

2. *Agent liable for.* An agent who solicits orders for intoxicating liquors, subject to the approval of his principal, is subject to prosecution for the unlawful sale of such liquors, though his principal holds a permit to sell under the law. *State v. Kriechbaum*, 633.

3. *Offense committed in two counties.* Where orders for intoxicating liquors are taken by an agent in one county, subject to the approval of his principal in another county of the state, the courts of either county may take jurisdiction of the offense. *Id.*

4. *Proof of.* In a prosecution for the illegal sale of intoxicating liquors to a person named, the books of an express company showing the dates upon which boxes of goods shipped from the defendant's place of residence to such person were received at the residence of the latter, and that they were delivered to him, and the date of such delivery, is material. *Id.*

5. *Proof of.* Where such prosecution is against one holding a permit under the law to sell intoxicating liquors, and the fact that sales of liquors have been made by defendant is not questioned, the burden of proof is upon him to show that the sales were not in violation of law. *Id.*

6. *To husband, wife may recover damages.* In an action by a married woman against a saloon keeper for damages on account of the sale of intoxicating liquors to her husband, proof of having furnished intoxicating liquors to the husband upon the order and promise of payment by a third person is sufficient to sustain the action. *Judge v. Jordan*, 519.

7. *Nuisance—use of premises for.* The use of premises for the purpose of selling, and selling therein, intoxicating liquors prohibited by law, is an indictable offense under Code, section 1543, upon a first violation of the provisions thereof. *State v. Adams*, 593.

8. *Nuisance—evidence of liquors found at another place.* After a witness had given testimony tending to show that liquors were kept and sold by defendant at the place named in the indictment, *held*, that it was proper to allow him to testify to finding five barrels of bottled beer at the residence of defendant's father, with whom defendant resided, in another part of the city. *State v. Illsley*, 49.

9. *Nuisance—presumption arising from possession of liquors.* An instruction that the finding of intoxicating liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling-house which does not include, or is not used in connection with, a tavern, public eating-house, restaurant, grocery, or other places of public resort, is presumptive evidence that such liquors were kept for illegal sale, and that proof of actual sale is presumptive evidence of illegal sale. *Held*, not subject to the objection that it does not state the law in clear and concise language. *Id.*

10. *Nuisance—evidence—instruction.* In a prosecution for maintaining a nuisance by selling intoxicating liquors upon certain premises described in the indictment, it appeared that the defendant, upon receipt of money therefor, issued orders for such liquors at his blacksmith shop, which were inclosed, with the money received, in an envelope, which being presented at a depot two blocks away the purchaser would receive the liquors called for by the order. *Held*, that, in view of the above evidence, an instruction to the jury, that if they found that the defendant "gave to any person any order by means of which he procured liquors of the character described in the indictment from the express office, or any other building, and that he received the money for such liquors at his blacksmith shop, substantially as charged in the indictment this will be evidence that you may consider in determining whether or not the defendant is guilty, was not erroneous. *State v. Briggs*, 585.

11. *Nuisance—judgment.* Upon a conviction under an indictment for maintaining a liquor nuisance upon certain prescribed premises, a judgment ordering the destruction of the liquors found upon the premises in controversy, and the removal and sale of all fixtures, furniture, vessels, and all movable property used in, or about, the premises in carrying on the unlawful business, and that the building be closed, as against its use for saloon purposes, for the period of one year, unless sooner released as provided by law, is authorized by Acts, Twenty-first General Assembly, chapter 66, section 5. *State v. Adams*, 593.

HIGHWAYS.

ESTABLISHMENT OF.

1. *Boundaries—estoppel.* The plaintiff caused a highway to be located across lands owned by him, sold a lot on one side thereof, and afterwards built a fence along said road on the side of the land retained by him, and his grantee built a fence on his side. The space between these two fences was worked and traveled by the public for twenty-five years, and after twenty years the plaintiff rebuilt his fence on the same line. *Held*, that the boundaries of such highway had been established by the acts of the plaintiff, and of the public, and by the lapse of time, and that plaintiff was estopped from claiming any portion of said road as his own. *Sherman v. Hastings*, 372.

IMPROVEMENT OF.

2. *Agreement of township trustees—estoppel.* The township trustees having agreed that the township clerk should receive certain moneys held by the county treasurer, and that therewith all the *legal* debts of the township should be paid, the county treasurer paid to said clerk the proceeds of a tax levied and collected for the payment of the orders above referred to. *Held*, that the orders not being a *legal* debt, the officers of the township were not estopped, under their agreement, from denying liability for the money so received. *Cass County Bank v. Conrad*, 482.

3. *Township trustees—authority.* Township trustees have no authority under the law to borrow money for the improvement of the highways of the township, nor to make the improvement of the highways in one district a charge upon the other districts of the township, and orders issued by the trustees upon the township clerk for that purpose, and for which no fund has been provided, are invalid. *Id.*

HOMESTEAD.

NOT ACQUIRED IN PROPERTY FRAUDULENTLY CONVEYED.

1. *Agreement for reconveyance.* Where one makes a conveyance of real estate without consideration, and presumably in fraud of creditors, and, under agreement for a reconveyance thereof when requested, he retains no such interest therein, as upon his subsequent marriage, and occupancy of the premises with his family, will enable the wife to acquire a homestead interest in said property as against said grantor's individual conveyance thereof in pursuance of a power of attorney from the grantee under said fraudulent conveyance. *Johnston v. McPherran et al.*, 230.

LIMITS OF.

2. *Five acres in city plat.* A homestead of between four and five acres of land will not be rendered liable to execution because of its lying partly within the limits of a city if not a part of a city plat. *Beyer v. Thoeming*, 517.

HOMESTEAD. *Continued.*

CONVEYANCE OF.

3. *Fraud—creditors.* A judgment is not a lien upon the homestead of the judgment debtor, and the latter's conveyance of such property to his wife will not be deemed fraudulent as to the judgment creditor. *Id.*

FORECLOSURE OF MORTGAGE.

4. *Wife not made a party—res adjudicata.* A husband, against whom a decree of foreclosure of a mortgage on real estate has been duly obtained, cannot, in an action of forcible entry and detainer to recover possession after the period of redemption, set up the defense that his wife, who was not a party to the former suit, has a homestead interest in the mortgaged premises; such fact, if a defense at all, being available in the former suit, must be deemed to have been adjudicated or waived. *Dodd v. Scott,* 319

EXECUTION SALE.

5. *Sheriff's deed—platting.* The plaintiffs being the owners of forty acres of land, on which was situated their dwelling, and of fifteen acres adjoining, all of which was occupied as a homestead, but was subject to the lien of a judgment in favor of the defendant, the latter caused an execution to be levied thereon. Thereupon plaintiffs served notice upon the sheriff that the forty-acre tract was claimed as a homestead. *Held,* that plaintiffs' notice rendered the platting of the homestead prior to the sale under the execution unnecessary, and for an omission to plat the same a sheriff's deed based upon such sale would not be set aside. *Smith v. De Kock,* 535.

See Mortgages of Real Estate; Wills.

HUSBAND AND WIFE.

TRANSACTIONS BETWEEN.

1. *Fraud.* An insolvent husband cannot by procuring a loan of money to be made upon his wife's obligation, and conducting business therewith in her name, protect the results of his industry and skill from the claims of his creditors. *Hamill & Co. v. Augustine,* 302.

ANTENUPTIAL AGREEMENT.

2. *Dower—validity.* An antenuptial agreement provided, that the parties thereto should not in any manner be restricted in the control or disposition of their respective properties; that the woman thereby released all right of dower or homestead in the property of her prospective husband, and in lieu thereof should receive, in case she survived her husband, the interest on the sum of three thousand dollars from the date of the latter's death, to be paid annually as long as she remained his widow. *Held,* that in

HUSBAND AND WIFE. ANTENUPTIAL AGREEMENT. *Continued.*

view of the circumstances, that at the time of the agreement both parties were over fifty years of age, the man, a widower with three children, and worth about fifty thousand dollars, the woman without property, and dependent upon her brother and her personal earnings for support; that the parties having been acquaintances and neighbors for a number of years, the woman might be presumed to know the amount of the other's property; and that the woman had a general knowledge of the rights she would have, as wife, in such property, the agreement was not so illiberal as to raise a presumption of the use of undue influence over the woman, nor was it so unreasonable and so unconscionable that it ought not to be enforced, and the evidence fails to show any undue influence in fact. *Peet v. Peet*, 172.

3. *Husband's desertion of wife.* The removal of the husband during his last illness, with his consent, to the home of his son, to the end that he might be better cared for, his wife being unable to care for him without the assistance of neighbors, and her nervous condition being such as to render her presence irritating to her sick husband, was not such a desertion of the wife by the husband as to prevent the enforcement of the above agreement. *Id.*

4. *Abandonment.* The joinder of the wife with her husband in executing conveyances of real estate, which might under said agreement have been executed without her, will not operate as an abandonment of said contract. *Id.*

WITNESSES.

5. *Declarations of one against the other—agency.* In an action by a married woman proof of the declarations of her husband, alleged to have been made while acting as the agent of the wife, is not admissible in evidence against the wife in the absence of the proof of such agency. *Judge v. Jordan*, 519.

IMPROVEMENT OF WIFE'S PROPERTY BY THE HUSBAND. See Mechanic's Lien, 2, 3.

JUDGMENT.

ASSIGNMENT.

1. *Certified copy as evidence—evidence.* Where the assignment of a judgment has been made a part of the record of the court, a certified copy thereof is competent evidence in an action on the judgment in a foreign court, the same as other parts of the record. *Coughran v. Gilman*, 442.

LIEN OF.

2. *Extinguished by sale and deed under prior lien.* Pending an action to foreclose a mortgage upon certain real estate, the defendants obtained a judgment against one of the owners thereof. After decree in the foreclosure proceeding, the property was sold on special execution, and a sheriff's deed in due time was issued

JUDGMENT. LIEN OF. *Continued.*

to the assignee of the holder of the certificate of sale. *Held*, that the mortgage being a prior and paramount lien the foreclosure and sale thereunder operated to pass the title to said property to said purchaser clear of the lien of defendants' judgment, and defendants were properly enjoined from seeking to enforce the same against the property on execution. *Austin v. Bowman Bros.*, 277.

3. *Limitation—execution.* The lien of a judgment will not be extended as against a junior lienholder by the levy of an execution thereon within the period of limitation, but without a sale thereunder until after the expiration of ten years from the date of the judgment. *Lakin v. McCormick & Bro.*, 545.

REDEMPTION.

4. *Entry of credit on judgment—satisfaction.* The portion of the mortgaged premises covered by O.'s mortgage was sold separately, and purchased by plaintiff. Within the required period O. redeemed from the sale, but did not enter upon the record the amount he was willing to credit upon his judgment against P. *Held*, that the omission to make such entry did not operate as a satisfaction of O.'s judgment against P. *Mont. Sav. Bank v. Arnold*, 158.

PERFORMANCE.

5. *Payment of costs.* The district court made an order in vacation granting the plaintiff a new trial upon condition, that it pay the costs in the case by noon of the next day after service of notice of said order, if served in term time. The notice was so served and before noon of the next day, the amount of the costs having been ascertained, plaintiff 's counsel requested the clerk to consider the costs paid, and he would see his client, and have him give him the money. To this the clerk assented, and entered his receipt for the money of record. The money not having in fact been paid, however, the defendant more than a month afterwards filed a motion for judgment on the above order of court *Held*, that plaintiff had sufficiently complied with the order to entitle it to the new trial. *National Bank of Grundy Center v. Brown*, 208.

APPEAL FROM.

6. *Not waived by recognition of rights secured by.* Acts of a party pending litigation in recognition of rights subsequently determined by a decree of the court therein but previously abandoned, will not operate as a waiver of the right of appeal from such decree. *Smith v. Gorrell*, 218.

7. *Not waived by part performance on suggestion of court.* The decree rendered herein provided for the transfer of certain real and personal property by the defendant to the plaintiff. Upon the suggestion of the court, the defendant surrendered possession of

JUDGMENT. APPEAL FROM. *Continued.*

the property in question, pending proceedings on appeal, to the plaintiff, for the purpose of reducing the amount of the *supersedeas* bond. *Held*, that there was not such a performance of the decree as to prevent an appeal. *Sample v. Collins*, 23.

CERTIFIED COPY AS EVIDENCE.

8. *Jurisdiction—presumption.* Where a certificate to the judgment record of a foreign court indicates on its face that it is a court of record, and that it has a seal and a clerk, it will be presumed in an action thereon, until the contrary is shown, that the court rendering such judgment had jurisdiction of the parties, and of the subject of the action. *Coughran v. Gilman*, 442.

JUDICIAL SALE.

HOMESTEAD.

1. *Execution sale—platting.* The plaintiffs being the owners of forty acres of land, on which was situated their dwelling, and of fifteen acres adjoining, all of which was occupied as a homestead, but was subject to the lien of a judgment in favor of defendant, the latter caused an execution to be levied thereon. Thereupon plaintiffs served notice upon the sheriff that the forty-acre tract was claimed as a homestead. *Held*, that plaintiff's notice rendered the platting of the homestead prior to sale under the execution unnecessary, and for an omission to plat same a sheriff's deed based upon such sale would not be set aside. *Smith v. DeKock*, 535.

2. *Return of execution—evidence.* The sheriff's return of the execution showed that the two tracts of land were offered separately, but did not show which was offered first. *Held*, that it was competent to show by parol evidence the order in which the different parcels were offered for sale. *Id.*

JURISDICTION.

NON-RESIDENT ASSIGNEE IN BANKRUPTCY.

1. *Nuisance—real estate.* The courts of this state have jurisdiction of actions commenced under Code, section 1543, for the abatement of a nuisance, which is maintained upon real estate held by one as assignee in bankruptcy under appointment of a federal court in a foreign state, and such property is subject to the judgments of the courts in such cases to the same extent as other property within the state. *Radford v. Thornell*, 709.

2. *Offense committed in two counties.* Where orders for intoxcating liquors are taken by an agent in one county, subject to the approval of his principal in another county of the state, the courts of either county may take jurisdiction of the offense. *State v. Kriechbaum*, 688.

JURISDICTION. *Continued.*

OFFENSES AGAINST PROHIBITORY LIQUOR LAW.

3. *Indictment—district court.* The use of premises for the purpose of selling, and selling therein, intoxicating liquors prohibited by law, is an indictable offense under Code, section 1543, upon a first violation of the provisions thereof, and is, therefore, within the jurisdiction of the district court. *State v. Adams*, 593.

PRESUMPTION.

4. *Action on foreign judgment—evidence.* Where a certificate to the judgment record of a foreign court indicates on its face that it is a court of record, and that it has a seal and a clerk, it will be presumed in an action thereon, until the contrary is shown, that the court rendering such judgment had jurisdictionof the parties, and of the subject of the action. *Coughran v. Gilman*, 442.

JURY.

CHALLENGE FOR CAUSE.

1. *Formation of opinion.* The rule announced in *State v. Vatter*, 71 Iowa, 557, and *State v. Munchrath*, 78 Iowa, 268, in relation to the right to challenge a juror for cause who has formed or expressed an opinion as to the guilt or innocence of the defendant in criminal cases, adhered to. *State v. King*, 587.

2. *Formation of opinion.* A juror who was a member of the regular panel, upon his examination as to challenge for cause, stated that he had heard one of the parties to the cause make a statement in regard to the merits of the controversy,and had formed an opinion which would require evidence to remove, but that it would not prevent him from rendering a just verdict on the evidence. *Held*, that the action of the trial court in sustaining a challenge to such juror, made under subdivision 9, section 2772, of the Code, would not be regarded as erroneous, although such challenge might properly have been overruled. *Sprague v. Atlee*, 1.

PEREMPTORY CHALLENGES.

3. *Ex post facto laws—acts pertaining to remedy—validity.* At the time defendant's crime was committed the law in force entitled defendants in such cases to twenty peremptory challenges to the jury, and the state to but ten. Subsequently, the law was amended by the legislature, so as to give the defendant but ten such challenges, the same as given to the state ; which law did not go into effect until after the commencement of the prosecution herein. *Held*, that the amendment affected no vested right of the defendant, but pertained merely to the remedy, and was valid. *State v. Shreves*, 615.

JURY. *Continued.*

MISCONDUCT OF.

4. *Evidence—appeal.* The determination of the district court upon the question of the misbehavior of jurors on the trial of a cause cannot be reviewed on appeal when it appears that all the evidence upon that subject is not before the supreme court. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

LANDLORD AND TENANT.

CANCELLATION OF LEASE.

1. *Agreement to cancel—evidence.* The agreement of a landlord to release a tenant from further obligation under a lease of premises provided another tenant can be secured therefor, and his agreement to see a person named whom the tenant claimed would rent the same, will not operate as a release of the lessee from his obligation under said lease if another tenant is not in fact secured upon terms agreeable to the lessor. *Churchill v. Gronewig et al.*, 449.

2. *Estoppel.* The defendants plead an estoppel to plaintiff's claim for rent based upon an agreement alleged to have been made prior to their vacation of the leased premises, and introduced evidence of statements made by plaintiff on the basis of such agreement, and tending to prove an estoppel. *Held*, that, as the jury must have found that the alleged agreement was not in fact made, an instruction withdrawing the issue of an estoppel from the jury was not erroneous. *Id.*

REPAIRS.

3. *Construction of lease.* An agreement for the lease of a storeroom, cellar and "warehouse in rear of building," "to be used as a boot and shoe store," was made while the building was in course of erection, and contained the following paragraph in writing: "Said first party also to put up two partitions across storeroom; also one between said partitions; * * * and said partitions to be painted white by said first party. The whole room to be put in good order for use of said second party." *Held*, that the phrase, "whole room," in the last sentence, was to be construed as referring to the entire premises covered by the lease. *Bentley v. Taylor*, 306.

4. *Breach of conditions in lease—damages.* The petition alleged that, at the time plaintiff took possession, the cellar was insufficiently ventilated, wet and muddy, and that, by reason thereof, the storeroom was rendered damp and moldy, the plaintiff's goods damaged, and both cellar and storeroom made unfit for use as a boot and shoe store. *Held*, that the facts pleaded showed a breach of the express covenant above stated. *Id.*

LARCENY.

PROOF OF.

Identity of person. The defendant was brought from the state of Ohio to Appanoose county, Iowa, to answer an indictment for the theft of two horses, found against one Foster five years previous, and who had jumped his bail. In defense, he claimed that his name was Jared Hickey, and that, at the time of the commission of the offense alleged, he resided near Coldwater, Michigan. Twenty-two out of twenty-three witnesses, called by the state, testified that defendant was the identical man who had been found in the possession of the horses, and was arrested and lodged in jail five years before for the offense charged. Seven persons, among whom was the sheriff who made the former arrest, and the jailer then in charge of the jail, testified that defendant was not the man formerly arrested for the same offense. *Held*, that a verdict finding defendant guilty was sufficiently supported by the evidence. *State v. Foster*, 131.

LEWDNESS.

EVIDENCE.

Unlawful cohabitation—declarations. Where a man and a woman have been indicted jointly for lewd cohabitation, proof of the declarations of one of the defendants to third persons, and not in the presence of the other defendant, is admissible in evidence; but the jury should be instructed as to the effect to be given such testimony. *State v. Miller*, 72.

LIBEL.

INDICTMENT.

1. *Matters of defense need not be pleaded.* Where, in an indictment for libel, the libelous matter therein alleged to have been published by the defendant is sufficient to constitute the offense, it is not necessary that the indictment negative facts which are mere matters of defense. *State v. Conable*, 60.

EVIDENCE.

2. *Contemporaneous publications.* Upon a trial under an indictment for libel based upon a specific portion of an article published during a political campaign concerning a candidate for office, the balance of such article and other disparaging articles published by the defendant during the same campaign, and concerning the same candidate, though not of a libelous nature, may be given in evidence by the state, if, taken in connection with the alleged libel, they will assist in determining the motive with which the publication was made. *Id.*

LIBEL. EVIDENCE. *Continued.*

8. *Falsity of charge.* The libelous matter upon which the indictment was based in this case charged a candidate for office with an agreement to sell an appointment to an office supposed to be under his control if elected, but the other party to the agreement was not named in the indictment. *Held*, that the person subsequently receiving such appointment, upon the recommendation of such candidate, although not the person with whom the defendant had charged the agreement had been made, might be permitted to testify upon the trial that he never gave, nor offered to give, anything to secure the appointment, as tending to show that the charge contained in the alleged libel was untrue. *Id.*

4. *Malice.* Upon cross-examination the defendant was asked if he had not formerly supported the subject of the alleged libel for office; also, whether he had not solicited his support for a particular office; to both of which questions the defendant objected as being incompetent and immaterial. *Held*, that, as defendant's publication of the libel may have been prompted through disappointment in not receiving the coveted office, proof of the facts sought to be elicited was proper as tending to show malice on the part of the defendant. *Id.*

5. *Privileged matter—verdict.* While the evidence in this case as to probable cause and good faith is such that the jury might well have found the alleged libelous article privileged within the rule heretofore announced by this court, and the evidence tends to show that the defendant believed the same to be true, yet the evidence being conflicting upon the question of the motive of the defendant in making such publication, the court cannot say that in finding the defendant guilty, as charged, the jury abused the discretion which the law gives them. *Id.*

LICENSE. See Common Carrier, 5; Negligence, 1.

LIMITATION OF ACTIONS.

WHEN STATUTE BEGINS TO RUN.

1. *In case of fraud.* The plaintiffs having been kept in ignorance of their rights through the fraudulent concealment of the facts by the defendant, *held*, that the statute of limitations did not begin to run as to their cause of action until their discovery of the facts on which the action was based. *Cook et al. v. C., R. I. & P. Ry. Co.*, 551.

2. *Insurance—benefit certificate.* Under a clause in a certificate of insurance in a mutual benefit association limiting the time for action thereon to six months, after the death of the assured, the limitation will not commence to run until the cause of action on such certificate matures. *Matt v. Mut. Aid Ass'n of Ottumwa*, 135.

LIMITATION OF ACTIONS. *Continued.*

CONTRACTS IN WRITING.

3. *Admission of indebtedness—evidence.* In an action upon a promissory note purporting on its face to be barred by the statute of limitations, the plaintiff may, for the purpose of proving an admission of indebtedness reviving the cause of action, be permitted to prove by oral evidence that the note in suit is a part of a greater indebtedness referred to in a letter written by the maker of the note to the plaintiff since the bar of the statute, and that the person named in said letter, to whom defendant stated he had paid interest on said indebtedness, was the agent of the plaintiff. *Miller v. Beardsley*, 720.

TAX SALES.

4. *Voidable—cannot be attacked after five years.* The purchase of property at tax sale by the county treasurer renders the sale only voidable, and the same cannot be attacked on that account after five years from the recording of the tax deed. *Lawrence & Burd v. Hornick*, 193.

5. *Voidable—cannot be attacked after five years.* The omission of the county treasurer to carry forward from year to year upon the tax lists the delinquent taxes assessed against certain described real estate, and for which the property is eventually sold, will not render such sale void, but only voidable, and the title based thereon cannot be assailed on that account after five years from the recording of the deed. *Id.*

FOR CONTEST OF WILLS. See Wills, 4.

MALICE. See Libel, 4.

MANDAMUS.

WHEN WRIT WILL LIE.

1. *School district—board of directors.* The board of directors of a school district will not be compelled by *mandamus* to relocate and remove a schoolhouse from one subdistrict to another, pursuant to a resolution passed by the board, upon the petition of residents of the subdistrict where such schoolhouse is situated, when the conduct of the board is in accord with the wishes of the electors of the district township as expressed at their annual meeting, and it does not appear that the petitioners will be prejudiced thereby. *Peters v. Warner*, 335.

2. *Against ex-officials—illegal taxes—recovery.* Where taxes in aid of a railroad were levied contrary to law, and collected by the county treasurer, and by him paid to the assignee of such railroad company after the tax had been declared invalid by the decisions of the supreme court, but the taxes so collected were never mingled with the county funds, and no part thereof was

MANDAMUS. WHEN WRIT WILL LIE. *Continued.*

in the treasury at the time of the trial herein, the writ of *mandamus* will not lie against such treasurer, after the expiration of his term, to compel him to refund the taxes so paid, nor against the present treasurer, who never received any of the moneys thus paid, nor against the board of supervisors, to require them to issue a warrant ordering said ex-treasurer to refund said taxes. *Eyerly v. Bd. Supervisors, Jasper Co.*, 189.

MANSLAUGHTER.

DEFENSE.

1. *Decedent's possession of disease of fatal nature.* The fact that the victim of an assault, resulting in death, was afflicted with a disease of a fatal nature, will not justify the wrongful act of his assailant, nor constitute a legal defense to the crime committed, whether the latter had knowledge of decedent's physical condition at the time of the assault or not. *State v. O'Brien*, 88.

EVIDENCE.

2. *Verdict.* The evidence in this case reviewed by the court, and *held* to sustain a verdict against the defendant for manslaughter. *Id.*

3. *Verdict.* The defendant was indicted for the crime of murder in the second degree. He admitted having inflicted the wounds resulting in death of the deceased, but insisted that he acted in self-defense. The evidence showed that, on the evening when the act was committed, the deceased was under the influence of liquor, and unable to walk steadily, and that when in such condition he was quarrelsome, garrulous and insulting; that he had previously taken offense at defendant because of a report that he had insulted his sister, and had stated to others that he intended to whip him the first time he saw him; that, meeting defendant on the street, he told him he wanted to speak to him, and the two walked off together; that so far as their conversation was overheard by others it indicated that the deceased was charging defendant with some reprehensible conduct, and that defendant was denying it; that finally the deceased addressed defendant, saying, "I will whip you," and "you have got to fight;" that soon afterwards the deceased was seen on the ground, with defendant leaning over him; that when the deceased was found just after the encounter he was unable to speak and was in a dying condition, and had six wounds upon his person, one in the back, another on the shoulder blade, another on the right arm, another just above the left eye-brow, another on the nose, and another on the left of the breast-bone, all of which except those on the nose and eye-brow were severe cuts, and were made by defendant with his knife; that before the fight deceased had removed his coat and vest, but when found he had no weapon on his person,

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MANSLAUGHTER. EVIDENCE. *Continued.*

and none was found at the place of conflict; that defendant's clothing after the encounter was neither soiled, torn nor disarranged, and there was no evidence that he received any injury. *Held*, that the evidence warranted the jury in finding the defendant guilty of manslaughter. *State v. Shreves*, 615.

CONVICTION FOR LESSER OFFENSE. See Murder.

MARSHALING OF ASSETS.

SURETY.

1. *Creditors—insolvency.* A creditor of an insolvent has not, as against a surety upon an obligation held by another creditor of the same debtor, such a superior equity in the fund representing such insolvent's estate as to entitle him to compel the creditor, whose claim is so secured, to resort to the surety for payment, before seeking satisfaction out of the common fund. *In re Assignment of Hobson*, 392.

DEBTOR AND CREDITOR.

2. *Where a purchaser* of property, that had been redeemed by the wife from sale under execution against her husband, took security against the lien of defendant's judgment, and other clouds upon the title, equity will not require him to abandon his title to the property, and seek to recover upon his security. *Austin v. Bowman Bros.*, 277.

MECHANICS' LIEN.

AGAINST LEASEHOLD INTEREST IN LAND.

1. *Forfeiture.* Under an agreement for the lease of a vacant city lot providing that, in case of default in the payments, to be made by the lessee, the lessor might consider the agreement at an end, and the premises and all the improvements made thereon shall thereupon revest in the lessor, one who, with notice of such agreement, supplies the lessee during his term with materials for the erection of a dwelling-house upon the leased premises will, in the event of a forfeiture under said agreement, be entitled to a mechanic's lien upon such dwelling as against the lessor or his grantees. *Oliver & Miller v. Davis*, 287.

IMPROVEMENT OF WIFE'S PROPERTY.

2. *Knowledge of wife.* Where improvements upon the property of a married woman are contracted for by her husband, with the knowledge and consent of the wife, and the latter permits the erection of such improvements without objection on her part, the premises will be subject to a mechanic's lien therefor as provided by law. *Frank v. Hollands*, 164.

MECHANICS' LIEN.

IMPROVEMENT OF WIFE'S PROPERTY. *Continued.*

3. *Foreclosure—decree.* A decree foreclosing a mechanic's lien against a dwelling-house erected by the husband with his own means is not inconsistent with proof that the ownership of the ground on which such erection was made was in the wife at the date of said improvement. *Estabrook v. Riley & Armin*, 479.

MINORS.

EMPLOYMENT OF. See Negligence, 11, 15.

MORTGAGES OF PERSONAL PROPERTY.

POSSESSION OF PROPERTY.

1. *Right of as between mortgagees.* A written instrument whereby a mortgagor surrenders the possession of all his interest in specific personal property to a person named, giving him power to lease or sell the same, and apply the same to certain indebtedness, will not entitle such person to the possession of said property, as against one claiming under a prior mortgage upon the same property. *Parker v. Farmers' Loan & Trust Co.*, 458.

PRIORITY OF LIEN.

2. *As between several notes secured by same mortgage.* A chattel mortgage was given to secure the payment of three promissory notes falling due at different times. After the payment of the note first maturing, the note last maturing was transferred, before maturity, to the defendants. Thereafter there was an exchange of part of the mortgaged property between the mortgagor and mortgagee, whereby the second note was in part, if not wholly, paid. Subsequently, this second note was transferred, after maturity, to the plaintiff. *Held*, that the note last maturing should be first satisfied out of the property remaining subject to the mortgage. *Mass. Loan & Trust Co. v. Moulton*, 155.

SATISFACTION.

3. *Purchase of mortgage by vendee after rescission of sale.* After the rescission of a sale of personal property the vendee purchased a chattel mortgage against the same property, which, by the terms of the sale, he was to assume and pay. *Held*, that the contract of sale having been rescinded the purchase of the mortgage did not operate as a payment, thereof, and that defendant was entitled to enforce the same against the property. *Kuhlman v. Wood*, 128.

MORTGAGES OF REAL ESTATE.

EXECUTION IN BLANK.

1. *Homestead—cancellation—evidence.* In an action in equity to obtain the cancellation of a mortgage upon the ground that the plaintiff, a married woman, had signed the same with the property description blank, and that subsequently her husband, before

MORTGAGES OF REAL ESTATE.

EXECUTION IN BLANK. *Continued.*

delivery to defendant, inserted the description of property constituting their homestead, it appeared that the mortgage was prepared by the attorney for the defendant, upon an ordinary printed form, all blanks being properly filled ready for execution, except that for the description of the property mortgaged, which blank was afterwards filled by defendant's husband by inserting the description of the homestead in question. The mortgage was acknowledged before a notary in the bank, and both the plaintiff and her husband testified positively that at the time of such acknowledgment the instrument contained no description of the property in question. In this they were partially corroborated by two witnesses. On the other hand the notary and defendant's cashier were equally positive that the mortgage did then contain such description, and they were corroborated by the presumption arising from the condition of the mortgage at the time of the trial, and by the testimony of the president of the bank. *Held*, that it was not shown by a preponderance of the evidence that the description of the homestead was not contained in the mortgage at the time of plaintiff's acknowledgment thereof. *Harding v. Des Moines Nat. Bank*, 499.

RIGHTS OF JUNIOR LIENHOLDERS.

2. *Fixed by record—notice.* In an action by a junior mortgagee for the foreclosure of his mortgage, and for permission to redeem from the prior mortgage, the latter relief will not be denied, because, by reason of an extension of time for payment granted the mortgagor, the mortgage debt is not due, where it appears that the plaintiff had neither actual, nor constructive, notice of such extension of time at the time he received his mortgage. *Wheeler v. Menold*, 647.

PARTIES TO FORECLOSURE.

3. *Effect of decree as to general creditors.* Where in a suit for the foreclosure of a mortgage an issue is presented involving the rights of all parties having or claiming any interest in the property claimed under the mortgage, the determination of such issue by a court of competent jurisdiction is conclusive upon one who was then a mere general creditor of the mortgagor. *Omaha, etc., Ry. Co. v. O'Neill*, 463.

FORECLOSURE.

4. *Partnership agreement—decree.* Under an agreement between two copartners, P. and O., at the time of receiving a conveyance of certain real estate that P. should assume and pay, as his share of the purchase money for said property, a mortgage of fifteen hundred dollars, *held*, in an action to foreclose said mortgage that O. was entitled to a decree awarding him any surplus remaining

MORTGAGES OF REAL ESTATE. FORECLOSURE. *Continued.*

from the foreclosure sale, after satisfaction of the prior mortgage, and to a judgment against his codefendant P. for such amount as he should be compelled to pay to protect his lien against plaintiff's mortgage. *Montpelier Savings Bank v. Arnold*, 158.

MUNICIPAL CORPORATION.

STREETS.

1. *Nuisance—abatement.* A city is entitled to the full width of its streets, and is charged with the duty of keeping the same in good repair and reasonable condition, and has the right to remove any obstruction found upon any part of its streets, put there without its authority. *Kemper v. City of Burlington*, 354.

2. *Nuisance—notice to remove—abandonment.* Whether a failure to remove an obstruction from the streets of a city within a reasonable time after notice from the city will constitute an abandonment of such obstruction, depends upon the attending circumstances of each particular case, and is a case for the jury. *Id.*

3. *Nuisance — abatement — mode.* The defendant asked an instruction to the jury, that, if plaintiff failed to remove the obstruction in the street when notified to do so, the city might abate the nuisance, and it would not be liable to plaintiff for having abated it in the most advantageous manner, namely, using the obstructing material in the repair of its streets. *Held*, that in the absence of any showing that the plaintiff had abandoned the material, or that defendant's disposition of it was simply for the purpose of removing the obstruction, the instruction was properly refused. *Id.*

4. *Nuisance—use of by city.* The city having used the material that had been deposited in one of its streets, in part for the purpose of repairing the same, and in part to clear the street of the incumbrance, *held*, that the city was not entitled to recover for the cost of removing the incumbrance, and was liable for the value of the material used, where and as it was, above the cost of its removal. *Id.*

5. *Defect—notice—negligence.* The accident resulting in injury to the plaintiff occurred between ten and eleven o'clock at night, and was caused by the removal of a barricade before an opening in the public sidewalk of the defendant city between ten o'clock of the same evening and the time of the accident. *Held*, that the facts did not warrant a presumption of knowledge on the part of the city of the removal of the barricade prior to the accident, and that, in the absence of evidence that the city had caused its removal or had actual notice thereof, it was not guilty of negligence. *Theissen v. City of Belle Plaine*, 118.

MUNICIPAL CORPORATIONS. *Continued.*

EVIDENCE.

6. *Resolution of city council—incumbrance of streets—repairs.* In an action by one, who had deposited rock in a city street, to recover of the city the value of such rock, which it was alleged had been used by the city in the repair of the street at the point of such deposit, the plaintiff introduced in evidence a resolution of the city council, passed the year before the appropriation of material complained of, and directing the street commissioner to repair the street in question. *Held*, that the evidence was competen upon the question whether the city authorized the repair in which the material was used, and the question whether it related to the repair in controversy was for the jury to determine. *Kemper v. City of Burlington*, 354.

ULTRA VIRES.

7. *Township—highway.* Township trustees have no authority under the law to borrow money for the improvement of the highways of the township, nor to make the improvement of the highways in one district a charge upon the other districts of the township, and orders issued by the trustees upon the township clerk for that purpose, and for which no fund has been provided, are invalid. *Cass County Bank v. Conrad*, 482.

SALARY OF OFFICERS. See Officers.

MURDER.

DEFENSES.

1. *Self-defense—instructions.* An instruction that if defendant went to the shop of deceased with a view to provoking a quarrel he could not avail himself of the plea of self-defense, if he killed deceased in the difficulty thus sought by him, "though such killing may have become necessary to preserve defendant's life, or his person, from an imminent and enormous injury," but that he would be guilty of either murder or manslaughter, *held*, in view of the evidence, not improper. *State v. Murdy*, 603.

2. *Self-defense—instructions.* The use of the expressions "enormous injury," "enormous bodily injury," and "dreadful injury," in the court's charge in relation to the danger which defendant must reasonably have apprehended before he was justified in taking the life of his assailant, is not erroneous. *Id.*

3. *Self-defense—instructions—use of word courageous.* An instruction to a jury upon the issue of self-defense in a prosecution for murder, that, in determining whether the defendant was justified in using a dangerous weapon in self-defense, the inquiry is "whether, from all the attendant and surrounding circumstances at the time of the conflict, it reasonably appeared to defendant, as a reasonable, prudent, courageous and cautious man, that he was

about to suffer death or great bodily harm" at the hands of the deceased, while not accurate according to a strict construction of the language used, yet it will not be deemed a reversible error when the rule applicable to self-defense is correctly stated in several other paragraphs of the court's charge, and it is apparent that the court intended to qualify the word "courageous" by the word "reasonably." *State v. Shreves*, 615.

4. *Justifiable self-defense—instructions.* An instruction to a jury that, if they found the defendant shot and killed the deceased in justifiable self-defense, they should acquit him, coupled with an instruction as to what would justify or excuse the taking of human life, is not objectionable because of the use of the qualifying word "justifiable" in connection with the term self-defense. *State v. Row*, 138.

5. *Self-defense--degree of force used.* An instruction that one "may rightly resist, by reasonable and moderate force, an unlawful and unauthorized attempt to arrest him, * * * but is not justified in carrying such resistance to an immoderate extent, or in using such extreme force or violence as to imperil life, unless, * * * he fairly and honestly believes that he is in imminent peril of death or of great bodily harm, and there is no other reasonable way of escaping the danger except by killing his assailant," is not subject to the objection, that it justifies in self-defense, under such circumstances, the use only of "reasonable and moderate force." *Id.*

CONVICTION FOR LESSER OFFENSE.

6. *Conspiracy—evidence of coconspirators—error without prejudice.* Where a trial upon an indictment for murder results in a verdict against defendant for manslaughter only, evidence introduced by the state in proof of a conspiracy to commit murder, and of declarations and admissions made by the coconspirators, and the instructions of the court to the jury in relation thereto, if erroneous at all, will be deemed error without prejudice, as, in acquitting the defendant of the charge of murder, the jury must have found in his favor on the question of the alleged conspiracy. *Id.*

7. *An instruction to a jury* that under an indictment for the crime of murder, if the evidence was sufficient, the defendant could be convicted of murder of the first or second degree, or of manslaughter, without an instruction that there might be a conviction for an assault with intent to commit a crime, or for a simple assault, is not erroneous in a case where the fact of homicide is undisputed, and the defendant, if guilty of any crime under the evidence, is guilty of murder or manslaughter. *Id.*

MURDER. *Continued.*

DEGREE.

8. *Instructions.* One paragraph of the court's charge instructed the jury that, if they failed to find that the defendant fired the shot in question "wilfully, deliberately and premeditatedly," they should find him "guilty only of murder in the second degree." This paragraph was preceded by an instruction as to the facts necessary to constitute the crime of murder in the first degree, and was immediately followed by instruction that, if they failed to find defendant guilty of murder in either the first or second degree, they should then determine whether he was guilty of manslaughter, and proceeded to define that crime. *Held*, that considering the whole charge together the paragraph complained of could not have resulted in prejudice to the defendant. *State v. Murdy*, 603.

EVIDENCE.

9. *Proceedings of coroner's jury.* Minutes of the proceedings and verdict of a coroner's jury upon an inquest over the body of one murdered is not admissible in evidence upon the trial of one under indictment for such murder. *State v. Row*, 138.

10. *A witness for the defendant*, having testified to having sold two revolvers to the accused, was asked various questions on cross-examination, as to whom the same were charged on his books, and whether they were not charged to defendant's employers. *Held*, that the inquiry was material. *Id.*

11. *Verdict.* The evidence in this case reviewed, and *held* to support a verdict of murder in the second degree. *State v. Murdy*, 603.

12. *Verdict—circumstantial evidence.* The deceased, with whose murder the defendant was charged, was found in his office fatally wounded from a pistol shot, the wound and burned condition of the nose and eyelashes indicating that the pistol when discharged must have been placed with the muzzle against the face and under the eyebrow, and the situation of the revolver being such as it might naturally have been if discharged by the deceased himself. But two shots were fired, being about four and one-half seconds apart, both of which were from the revolver found by the side of the deceased; and but two balls were ever discovered, one in the head of the deceased, and the other in the back of defendant. The deceased was a man of good physique, in the vigor of his physical manhood, and capable of preventing a deadly assault with a revolver placed against his face. *Held*, that the indisputed facts in the case being inconsistent with murder, but consistent with suicide, the burden was upon the state to overcome the presumptions arising from such facts with affirmative proof of the guilt of the defendant, and that the state having failed to do this a verdict of murder in the second degree was erroneous. *State v. Billings*, 99.

NEGLIGENCE.

DUTY TO PUBLIC.

1. *Railroad crossing—license—personal injury.* Conduct on the part of a railroad company amounting to an invitation or license to *cross* its tracks at a point where there is no street or public highway is not to be construed as a license to *walk along* its tracks, and one so walking cannot claim of the railroad company the duty of exercising ordinary care in the movement of its trains to prevent his injury, even though said tracks have been habitually so used by the public, and without disapproval on the part of the company. *Richards v. C., R. I. & P. Ry. Co.*, 426.

2. *Railroad crossing.* The fact, that the point where one is injured, while so walking upon the railroad company's right of way, and between its tracks, is used as a public crossing over said tracks, will not impose upon the railroad company any increase of duty to such person. *Id.*

3. *Railroad—street crossing—flagman.* Whether the failure of a railway company to keep a flagman on duty at a street crossing in a city, over which its road passes, at a given hour in the day, constitutes negligence, is a question to be determined from a consideration of all the circumstances of the particular case. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267.

4. *Railroad—street crossing—flagman.* The knowledge of a traveler over a railroad at a street crossing that no flagman is stationed there at such hour, and his dependence, for that reason, upon his own sight and hearing to discover the approach of trains, will not excuse the railroad company for its negligence in not keeping a flagman stationed at the crossing at such hour. *Id.*

5. *Municipal corporation--streets—notice.* The accident resulting in injury to the plaintiff occurred between ten and eleven o'clock at night, and was caused by the removal of a barricade before an opening in the public sidewalk of the defendant city between ten o'clock of the same evening and the time of the accident. *Held*, that the facts did not warrant a presumption of knowledge on the part of the city of the removal of the barricade prior to the accident, and that, in the absence of evidence that the city had caused its removal or had actual notice thereof, it was not guilty of negligence. *Theissen v. City of Belle Plaine*, 118.

DUTY TO EMPLOYES.

6. *Railroads—safety of appliances—personal injury.* Where the car-coupler employed by a railroad company on one of its freight cars was one not commonly used, and was not reasonably safe when used with such cars, and one employed as a "wiper," having no previous knowledge that such coupler was in use, nor of its dangerous character, while attempting to make a coupling

NEGLIGENCE. DUTY TO EMPLOYES. *Continued.*

with such car was injured, *held*, that the "wiper" had a right to believe that the cars and appliances used by the company were reasonably safe, and that the company was negligent in not informing him of the dangers of the service, and of the methods of avoiding it. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

7. *Railroads—construction of switch—personal injury.* In an action to recover damages for personal injury to plaintiff's intestate, while employed as a brakeman on defendant's railroad, based upon the negligence of defendant in maintaining a "split switch" in a defective condition, whereby the defendant's foot was caught between the rails while coupling, and he was thrown down and injured, the jury found specially that the defendant was not negligent in maintaining such a switch at the point in question, but that the switch was not constructed as such switches generally are, and that it was out of repair, the rails being too far apart, and returned a general verdict for plaintiff. The evidence showed that at the point of the switch the rails could be set within two and one-half inches of each other or less, and the danger complained of be avoided, whereas the rails of the switch in question were about three and three-fourths inches apart, and were likely to catch the foot and hold it fast. *Held*, that the evidence warranted the jury in finding that plaintiff's intestate was injured through the negligence of the defendant. *Brooke v. C., R. I. & P. Ry. Co.*, 504.

8. *Switch out of repair—instructions to jury.* An instruction to the jury that they should "determine whether or not the switch was properly constructed; that is to say, whether it was in perfect order or repair;" that "the defendant was bound to exercise ordinary care in keeping the switch in a reasonably safe condition, having regard to the safety of its employes," *held*, not objectionable as fixing, as a matter of law, the degree of order or repair that such a switch should be kept in to be reasonably safe for the use intended. *Id.*

CONTRIBUTORY NEGLIGENCE.

9. *Relieves negligent party from liability.* The plaintiff in going from his home to the post-office, which was situated at a point northeast of the plaintiff's house, and on the east side of said railroad, instead of going east over defendant's tracks at the street crossing to the street on which the post-office was situated, and then going northward to his destination, his most direct route, went east to a point on defendant's right of way, and then turned northward, walking in a space eight feet wide between tracks. Just before plaintiff crossed the west track of the two an engine and caboose passed him going south, and soon after turning north an engine and stock train went south on the east and main track. The distance from plaintiff to where the west track joined the

main track was only one thousand feet, and plaintiff knew that on account of the stock train the engine and caboose could only go that distance. He looked back once, and saw the engine and caboose still going south. The engine, however, after drawing the caboose south on the west track for a short distance, backed on the same track, finally giving the caboose a "kick," propelling it northward at a speed of ten or twelve miles an hour. When plaintiff had gone about five hundred feet, and while walking the west track, the caboose struck him, throwing him violently to the ground in such a manner that one foot was thrown on a rail and crushed. *Held*, that, conceding the defendant to have been negligent, the plaintiff was guilty of contributory negligence, and was not entitled to recover damages for the injury sustained. *Richards v. C., R. I. & P. Ry. Co.*, 426.

10. *Use of word proximately—instructions.* In an action for damages for a personal injury sustained through the alleged negligence of another, an instruction to the jury that, to entitle the plaintiff to recover, he must show himself to have been free from negligence that *proximately* contributed to the injury is not improper. *Theissen v. City of Belle Plaine*, 118.

11. *Employment of minors—negligence of coemploye—ratification.* A boy thirteen years of age, employed in a sawmill for the work of removing sawed materials from a steam saw, was directed by the boss or foreman of the establishment to operate such saw in the absence of the usual operator, without giving him instructions as to the proper manner of operating the same, nor of changing the gauge thereof, and such direction was subsequently ratified by the common employer. While so employed the boy received orders to saw a particular kind of material, which, if obeyed, would not have exposed him to the danger resulting in the injury received; but he refused to obey them. Subsequently he received different orders, which he obeyed; and afterwards, while engaged in changing the gauge of the saw, the boy, without fault on his part, received the injury therefrom upon which this action is based. *Held*, that, in view of the subsequent change of orders, and his obedience thereto, the boy was not guilty of contributory negligence on account of his disobedience of orders previously received, nor because other methods of changing the gauge, which were beyond his strength, were less dangerous than the one adopted. *Sprague v. Atlee*, 1.

12. *Railroad employes—scope of employment.* An employe of a railroad company who is employed as a man of all work about a roundhouse, and is required to assist in taking engines in and out of the roundhouse, and who has not been specially instructed as to his duties, is not to be held chargeable with negligence upon uncertain and nice distinctions as to the limits of his employment, when in good faith he performs a service outside the line of his duty. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

NEGLIGENCE. *Continued.*

PROXIMATE CAUSE.

13. *Fire—personal injury.* One of the defendant's engines having set fire to grass and weeds on its right of way, opposite the premises of O., with whom the plaintiff resided, the plaintiff and O. sought to extinguish the flames, but were unsuccessful, and a high wind having carried the fire toward O.'s barn, which contained some horses belonging to the latter, the plaintiff entered the barn to save this property, but before returning therefrom the fire had encompassed the doorway of the barn, and the plaintiff in making his escape therefrom was badly burned, and his health and sight seriously impaired. *Held*, upon demurrer to plaintiff's petition, which alleged the above facts, and, further, that the fire was caused by defendant's negligence, and that the plaintiff was free from negligence, that the negligence of the defendant was the proximate cause of the injury to the plaintiff. *Liming v. Illinois Cent. Ry. Co.*, 246.

PLEADING.

14. *Railroad—street crossing—personal injury.* The plaintiff alleged in his petition that the defendant carelessly and negligently caused the rear end of a freight train, propelled by an engine to pass rapidly over its tracks while approaching a street crossing, whereby he and his horses and wagon were injured. In support of these allegations, the opinions of witnesses were received in evidence as to the speed of the train at the time, and there was evidence as to the time the train started, the distance it traveled, the force with which it struck the wagon and horses, and the distance it moved after striking them. *Held*, that negligence was sufficiently charged in the petition, and that the evidence was such as to warrant the submission of the question to the jury. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267.

EVIDENCE.

15. *Employment of minors.* Testimony of the apparent intelligence of a minor, and of his apparent understanding of mill machinery, is not competent as proof of his capacity to operate such machinery. Moreover, where such minor has testified upon the trial the jury are as competent as others to judge of his intelligence. *Sprague v. Atlee*, 1.

16. *Defective machinery—expert testimony.* In an action for damages for a personal injury sustained by an employe while operating a steam saw, which was shown to be less generally used than other machines of its kind and the operation of each described to the jury, the testimony of an expert that the gauge of the machine used by the defendant is as safe as that of any other machines then in use is inadmissible. *Id.*

NEGLIGENCE. EVIDENCE. *Continued.*

17. *Fire—employe's knowledge of defective smokestack.* The evidence showed that large cinders of the size of a hickory nut where thrown from the smokestack of defendant's engine, and that the spark-arrester of such engine to permit the escape of such cinders must have been out of repair. *Held*, that the evidence warranted the inference that defendant's employes who operated the engine had knowledge that the spark-arrester was out of repair, and that such knowledge would support a finding that the defendant was negligent. *Knight v. C., R. I. & P. Ry. Co.*, 310.

18. *Acts of coemployes.* Evidence of the belief, expectation or purpose of a coemploye in charge of the engine, with which said coupling was made, as to the action of the employe making the coupling, of which the latter had no knowledge, is not admissible in an action to recover for injuries sustained in such service. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

19. *Fire—circumstantial evidence.* In an action against a railroad company to recover for the loss by fire of certain household goods situated in a house located four hundred and twenty-one feet from defendant's right of way, after proof that, shortly before the fire, one of defendant's engines had passed along its road, that a pile of lumber on its right of way had been set on fire, and that a hard wind was blowing at the time from the lumber pile toward the plaintiff's house, the plaintiff introduced evidence against defendant's objection, that charred shingles after the fire, and on the same day, were found a quarter of a mile beyond plaintiff's house, and in the direction the wind was blowing. *Held*, that the evidence was admissible as tending to show the source of the fire whereby plaintiff's property was destroyed, and that an instruction asked by defendant, that from the facts proven no inference could be drawn as to the source of the fire, was rightly rejected. *Knight v. C., R. I. & P. Ry. Co.*, 310.

20. *Established by circumstances.* There was no direct evidence that the foot of the deceased was caught in the switch, and was the cause of his fall, but his shoe worn at the time was introduced in evidence and presented a wrenched appearance. *Held*, that this evidence, considered in connection with the circumstances under which the accident occurred, was sufficient to support a finding that the deceased fell through having his foot so caught. *Brooke v. C., R. I. & P. Ry. Co.*, 504.

21. *Running cars when man in dangerous situation.* The plaintiff's petition charged defendant with negligence in rapidly running its cars over the deceased "after it was known by those in charge of the train that he was injured, *and* in a dangerous situation." The court instructed the jury that they would be warranted in finding the defendant negligent if they found that its cars were run over the deceased after those in charge knew that

NEGLIGENCE. EVIDENCE. *Continued.*

"either the said Brooke was injured *or* was in a dangerous situation." *Held*, that the instruction was proper, and that it was supported by evidence that after the engineer saw the lamp carried by deceased go over his head, and supposed he had fallen, and that there was trouble, the engine went over the deceased twice, and a stock car once. Whether the fatal result was caused by the first or second movement of the train, *held*, immaterial. *Id.*

22. *Conflict—jury—practice.* Where in an action for personal injury, the close of plaintiff's testimony left a conflict in the evidence upon the question of negligence on the part of the defendant, and that of the plaintiff's freedom from contributory negligence, *held*, that the case should be left to the jury to decide, and that a motion, at such stage of the case, to instruct the jury to return a verdict for the defendant was properly overruled. *Theissen v. City of Belle Plaine*, 118.

23. *Railroad crossing—signals.* The defendant's witnesses testified that signal lights were displayed at the crossing, and the bell on the engine was rung as it approached the same. The plaintiff, on the other hand, testified that he did not see the lights nor hear the bell. *Held*, that if the plaintiff was in a position to hear the bell if rung, and see the lights if displayed, and he was listening and looking for that purpose, there was such a conflict in the testimony as to require the submission of the question to the jury. *Annaker v. Chicago, R. I. & P. Ry. Co.*, 267.

24. *Personal injury—Carlisle life tables.* Where in an action to recover damages for a personal injury the evidence is conflicting as to the permanency of the injury sustained, the Carlisle life tables may properly be received in evidence for the consideration of the jury in case they find the injury to be permanent. *Blair v. Madison County*, 318.

See Attorney and Client.

NEGOTIABLE PAPER. See Bills and Notes.

NEW TRIAL.

GROUNDS FOR.

1. *Newly-discovered evidence.* Newly-discovered evidence which is merely cumulative will not entitle a party to a new trial. *Blair v. Madison County*, 318; *State v. Watson*, 380.

2. *Newly-discovered evidence—diligence.* A party is not entitled to a new trial upon the ground of newly-discovered evidence where the facts upon which the motion therefor is based are of such a nature that they must have been known to him before trial, and it does not appear that the necessary diligence has been used to secure proof thereof, nor that any postponement of the trial on that account had been asked. *State v. Foley*, 36.

NEW TRIAL. GROUNDS FOR. *Continued.*

3. *Verdict not supported by evidence—duty of trial court when so convinced.* The trial judge in announcing his reasons for overruling the motion for a new trial stated, that if he were the jury trying this case he should render a verdict of not guilty; that it was possible that the defendant shot the deceased, but not probable; and that he thought, if there were no appeal, he should set the verdict aside. The remarks of the judge were, at his direction, taken down by the reporter, and were made a part of the record. *Held*, that the record sufficiently indicated that in the opinion of the district court the verdict was not supported by the evidence, and it was its duty, therefore, upon that ground, to have granted the defendant a new trial as provided by law; and that, having failed to do so, its judgment should for such reason be reversed, independent of the views of the supreme court of the sufficiency of the evidence to sustain the verdict. *State v. Billings*, 99.

4. *Cause tried in absence of counsel contrary to agreement.* An attorney may bind his client by an agreement with opposing counsel for the continuance of a cause from term to term, but no evidence of such an agreement is competent as against a party denying the same, except the statement of his attorney, or the attorney's written agreement duly signed and filed with the clerk of the court or an entry thereof upon the records of the court. But where such agreement may be legitimately drawn from the statements of an affidavit of a former attorney for the party against whom the agreement is sought to be enforced, and it appears that a cause has been called to trial contrary to the terms thereof, and in the absence of the opposite party, and of his attorney, a new trial thereof may be properly granted upon the petition of the party injured. *Council Bluffs Loan & Trust Co. v. Jennings*, 470.

APPLICATION FOR.

5. *By motion after three days—averments proper in petition.* Where an application for a new trial, made more than three days after judgment, is by motion, but the same contains an averment in which it is described as a petition, and contains statements and demands for relief which would be proper in a petition, it will be deemed sufficient, especially where objection thereto was not made in the court below. *Council Bluffs Loan & Trust Co. v. Jennings*, 470.

NOTICE.

CONSTRUCTIVE.

1. *Mortgage—record.* In an action by a junior mortgagee for the foreclosure of his mortgage, and for permission to redeem from the prior mortgage, the latter relief will not be denied, because, by reason of an extension of time for payment granted

NOTICE. CONSTRUCTIVE. *Continued.*

the mortgagor, the mortgage debt is not due, where it appears that the plaintiff had neither actual, nor constructive, notice of such extension of time at the time he received his mortgage. *Wheeler v. Menold*, 647.

2. *Sales of personal property—mortgage—evidence.* In an action to recover the possession of personal property the plaintiff claimed title under a mortgage from one W., while defendant's title was based upon a mortgage of prior date from S., the vendee of W. The latter mortgage plaintiff claimed to be invalid as against his, because when his mortgage was received from W. there had been no change in the possession of the property, nor was there any conveyance thereof of record. *Held*, that the possession of the property being an issue to be tried, the defendant's mortgage was properly received in evidence in proof of his title against plaintiff's objection. *Lansley v. Van Alstyne*, 476.

See Original Notice.

OFFICERS.

SALARY OF.

1. *County attorney—when determined—change during term—validity.* The salary of a county attorney having been determined by the board of supervisors under the provisions of Acts, Twenty-first General Assembly, chapter 73, section 11, cannot thereafter be either increased or diminished during his term of office, even though such determination may have been made under a misapprehension of the law as to such officer's right to fees in criminal cases. *Goetzman v. Whitaker*, 527.

See Certiorari; Mandamus.

ORIGINAL NOTICE.

PUBLICATION OF.

1. *Non-resident—assignees in bankruptcy.* A non-resident of this state having title to real estate within the state as assignee in bankruptcy may, under Code, section 2618, subdivision 6, be served with original notice of an action commenced against him in this state under Code, section 1543. *Radford v. Thornell*, 709.

2. *Failure to file petition—effect.* Where the original notice in a cause is served by publication, the failure to file the petition until after the time stated in the notice will not invalidate the service thereof, if the filing of the petition precedes the first publication of the notice. *Oliver & Miller v. Davis*, 287.

PARTNERSHIP.

AGREEMENT OF.

1. *Evidence.* An agreement made by defendant for the purchase of certain real estate recited, that he had secured the same for himself and the plaintiff herein, but was signed by himself alone. Immediately afterwards the plaintiff and defendant went together to a real-estate agent's office where a list of the property was made by the plaintiff for the agent, and signed by both parties. Afterwards, the defendant sold the property at a large advance, and plaintiff brought this action for an accounting, claiming that defendant's purchase was made under a verbal agreement between them to buy the property upon their joint credit for a resale, and share equally in the profits or losses. The defendant claimed that said agreement was made after the purchase, upon condition that the plaintiff would advance one-half the purchase price. Up to the time of the resale no part of the purchase price of the property, save the sum of five dollars paid to bind the bargain, had been paid. *Held*, that the circumstances attending the transaction supported the claim of plaintiff, that the agreement was made before the purchase by defendant, and that it was the intention of the parties that each was to contribute equally to the expenses of the purchase, and to share equally in the profits or losses of the enterprise. *Heard v. Wilder*, 421.

LIABILITY OF THIRD PERSONS AS PARTNERS.

2. *Estoppel.* A traveling salesman, engaged in selling goods by sample upon the premises of defendants, inquired of one of the partners as to whom a gentleman present, and recommending the purchase of certain goods, was, and was informed that he was the father of the partner, and was a member of the firm. The father was within hearing distance during such conversation, and made no denial of the truth of the above statement. The firm-name did not indicate that the father was a partner, but the plaintiffs extended credit to defendants upon the faith of the son's representation, and reports of the father's financial responsibility. *Held*, that the evidence was sufficient to support a judgment making the father liable to plaintiffs as a member of the firm, notwithstanding his specific denial that he held such relation, nor that he heard the above conversation with his son. *Davenport Woolen Mills v. Neinstedt*, 226.

3. *Evidence.* Letters written by the father subsequent to the extension of credit by the plaintiffs, and indicating a partnership relation in fact, *held*, admissible in support of that issue. *Id.*

CAPITAL.

4. *Contribution by partners.* The fact that, up to the time of the resale, the plaintiff had not contributed, nor offered to contribute, anything to an enterprise for the purchase and sale of real

PARTNERSHIP. CAPITAL, *Continued.*

estate, *held*, to be no evidence against the finding that plaintiff and defendant were partners in the transaction, as up to that time no part of the purchase price of the property, save the payment of five dollars to bind the bargain, had been paid. *Heard v. Wilder*, 491.

ASSETS.

5. *Conveyance of for debt of individual partner.* A conveyance of partnership property in payment in part of the firm indebtedness, and in part of the indebtedness of one of the partners, without the consent of all the partners, is void to the extent of the indebtedness of the individual partner, and may be attacked by a creditor of the firm. *Newell & Co. v. Martin et al.*, 238.

6. *General assignment of—individual creditors.* A general assignment by a copartnership for the benefit of the creditors of the firm, without provision for the creditors of the individual partners, is valid. *Bradley v. Bischel*, 80.

ACCOUNTING BETWEEN PARTNERS.

7. *Jurisdiction.* An action for an accounting between partners involving charges of fraud, accident or mistake, and requiring extended investigations of books of account and invoices, is properly brought in equity. *Donahue v. McCosh*, 296.

PAYMENT.

ACTS OPERATING AS.

1. *Purchase of chattel mortgage—contract.* After the rescission of the above sale, the defendant purchased a chattel mortgage against the same property, which, by the terms of the sale, he was to assume and pay. *Held*, that the contract of sale having been rescinded the purchase of the mortgage did not operate as a payment thereof, and that defendant was entitled to enforce the same against the property. *Kuhlman v. Wood*, 128.

2. *Court costs.* The district court made an order in vacation granting the plaintiff a new trial upon condition that it pay the costs in the case by noon of the next day after service of notice of said order, if served in term time. The notice was so served, and before noon of the next day, the amount of the costs having been ascertained, plaintiff's counsel requested the clerk to consider the costs paid, and he would see his client and have him give him the money. To this the clerk assented, and entered his receipt for the money of record. The money not having in fact been paid, however, the defendant more than a month afterwards filed a motion for judgment on the above order of court. *Held*, that plaintiff had sufficiently complied with the order to entitle it to the new trial. *National Bank v. Brown*, 208.

PAYMENT. *Continued.*

VOLUNTARY.

3. *Ignorance as to liability.* A payment of money in the belief that the demand is proper, and without the knowledge that it is wrongfully exacted, is not voluntary, and may be recovered back. *Cook et al. v. C., R. I. & P. Ry. Co.*, 551.

MISTAKE OF LAW.

4. *Voluntary—cannot be recovered.* The voluntary payment by a county, through its authorized agents, of fees claimed by one for services rendered in his capacity as sheriff of the county, under the mutually mistaken belief that the county is legally bound therefor, is a mistake of law and not of fact, and will not support an action for the recovery thereof by the county. *Painter v. Polk County*, 242.

EVIDENCE.

5. *Declarations of agent.* Proof of declarations made by an agent in the course of his employment for the sale and lease of certain lands, that such lands had been conveyed to his principal in payment of a promissory note held by the principal against the latter's grantor, is not admissible in an action by the principal against the grantor for the collection of such note to show payment thereof. *Sioux Val. State Bank v. Kellog*, 124.

6. *In an action* upon two promissory notes, held by plaintiff as guardian, the defendant pleaded payment, and alleged that the notes were not surrendered because of the representations of plaintiff that the same were lost or mislaid. The plaintiff admitted that the notes had been mislaid, but alleged that it was through fault of the bank where they were deposited, and denied payment. *Held*, under the issue thus presented, that defendant might show, that about six years after the alleged payment the plaintiff voluntarily executed a trust deed as additional security to the sureties upon his bond as guardian, and all the facts leading to its execution; also the reports made by plaintiff, as guardian, showing how he treated the notes in question; also such accountings as tended to show whether the money had been received; and the failure of defendant at times to make reports of his doings as required by law *Shockley v. Van Eaton*, 417.

7. *Under such an issue*, evidence of plaintiff's conduct in other transactions, entirely independent of that in controversy, indicating a defective memory and liability to mistake, is not competent. *Id.*

8. *Neither is it competent* for the defendant to show in such case that the plaintiff was sick and affected mentally about five years after the date of the alleged payment. *Id.*

PENSIONS. See Execution.

PHARMACY LAW.

EVASION OF. See Estoppel.

PLEADING.

PETITION.

1. *Time of filing—notice.* Where the original notice in a cause is served by publication, the failure to file the petition until after the time stated in the notice will not invalidate the service thereof if the filing of the petition precedes the first publication of the notice. *Oliver & Miller v. Davis*, 287.

2. *New trial.* Where an application for a new trial, made more than three days after judgment, is by motion, but the same contains an averment in which it is described as a petition, and contains statements and demands for relief which would be proper in a petition, it will be deemed sufficient, especially where objection thereto was not made in the court below. *Council Bluffs Loan & Trust Co. v. Jennings*, 470.

DEMURRER.

3. *Waiver.* Where facts constituting ground for demurrer appear upon the face of the petition in a cause, a failure to take advantage thereof either by demurrer or by motion in arrest of judgment will constitute a waiver of the objection. The question of plaintiff's right to relief because of such facts cannot be put in issue by a denial in the answer. *Linden v. Green*, 365; *Pitts v. Lewis*, 51.

CLAIM AGAINST ESTATE OF DECEDENT.

4. *Demurrer.* A claim filed against the estate of a decedent alleged the indebtedness of said estate to the claimant on account of the payment by him of one-third of the amount of a judgment against the decedent, the claimant, and another in a sum stated, with interest. *Held*, on demurrer, that the facts stated did not entitle the claimant to the relief demanded. *Pickrell v. Hiatt*, 537.

See Negligence, 14.

PRACTICE AND PROCEDURE.

RELIEF BY CROSS-PETITION.

1. *Interest in subject-matter of action.* In an action to foreclose a mortgage on real estate the defendant O., being the holder of a junior mortgage upon a part of the same premises, filed a cross-petition against his codefendant P. to enforce an agreement made with him by P., whereby he assumed and agreed to pay the mortgage sought to be foreclosed. *Held*, that the cross-petitioner, O., had such an interest in the subject-matter of the action, and said agreement with P. had such relation thereto, as to entitle him to seek relief thereunder in the same action. *Montpelier Sav. Bank v. Arnold*, 158.

PRACTICE AND PROCEDURE. *Continued.*

LAW QUESTIONS IN EQUITY CAUSE.

2. *Submission of to jury—appeal.* The submission of questions of fact in an equity cause to a jury for determination, though contrary to the rules of practice prescribed by the Code for the court of chancery, will not have the effect to transfer the case to the law side of the court, nor to deprive the parties, upon appeal, to a trial *de novo* in the supreme court. *Frank v. Hollands*, 164.

3. *Submission of to jury.* Where in an action for the possession of certain real estate, and for damages for the wrongful detention thereof, the question of ownership has been determined by the court, sitting as in equity, in favor of the plaintiff, the question of damages for the wrongful detention need not be submitted to a jury if the evidence discloses no dispute as to the facts upon which the recovery therefor is based. *Woodbridge v. Austin*, 671.

TIME TO OBJECT.

4. *Argument to jury—improper remarks by counsel for state.* A judgment in such a proceeding will not be reversed on account of improper remarks alleged to have been made by counsel for the state in the closing argument to the jury, when there is a marked conflict in the record upon the question whether such remarks were made, and it does not appear that any objection was made thereto until after the verdict was rendered. *State v. Shreves*, 615.

WITHDRAWING ISSUE FROM JURY.

5. *Where no evidence is introduced.* The plaintiff charged defendant with various acts of negligence, which defendant alleged had been waived by the deceased. No evidence of plaintiff's allegations was introduced, and the court in its instructions withdrew the same from the jury. *Held*, that under the circumstances the question of waiver was properly withheld from the jury. *Brooke v. C., R. I. & P. Ry. Co.*, 504.

6. *Where no evidence is introduced.* The plaintiff pleaded in one count of the petition an oral agreement on the part of defendant to procure additional insurance, to which plea there was a general denial. The issue thus formed was withdrawn from the consideration of the jury. *Held*, that there being no evidence of the power of defendant to enter into such a contract, nor of the agent's authority to bind the company by such a contract, the issue was properly withdrawn. [BECK and GIVEN, JJ., dissented from the opinion of the majority upon the last point.] *Garretson v. Insurance Co.*, 727.

7. *Insufficiency of evidence.* Where the evidence produced in support of an issue in a cause is so deficient in proof thereof that a verdict thereon in favor of the party presenting the same would be set aside, the court may properly withdraw such issue from the consideration of the jury. *Sioux Val., State Bank v. Kellog*, 124.

PRACTICE AND PROCEDURE.

WITHDRAWING ISSUE FROM JURY. *Continued.*

8. *Where evidence shows no cause of action.* Where the levy of a writ of attachment is fatally defective no damages are recoverable for the wrongful suing out of such writ, and, upon disclosure of such fact, evidence introduced under issues joined on the attachment defendant's counterclaim for such damages should be withdrawn from the jury. *Id.*

See Instructions.

DIRECTION TO JURY AS TO VERDICT.

9. *Conflict in evidence.* Where in an action for personal injury, the close of plaintiff's testimony left a conflict in the evidence upon the question of negligence on the part of the defendant, and that of the plaintiff's freedom from contributory negligence, *held*, that the case should be left to the jury to decide, and that a motion, at such stage of the case, to instruct the jury to return a verdict for the defendant, was properly overruled. *Theissen v. City of Belle Plaine*, 118.

ARGUMENT TO JURY.

10. *Limitation of—discretion of court.* At the close of the opening argument of one of the attorneys for the state, defendant's counsel asked to have the cause submitted to the jury without further argument. The state, thereupon, obtained permission to further address the jury, and afterwards arguments were made by defendant's counsel. *Held*, that the matter was one resting in the discretion of the court, and it was no abuse of such discretion, under the circumstances, to refuse to submit the case without affording the state an opportunity for further argument. *State v. Row*, 138.

JURY.

11. *Retirement of pending argument to court.* Upon a trial under an indictment for the commission of a felony, the court may, after the evidence is closed, direct the jury to retire to another room while it hears arguments from counsel upon the legal propositions involved in the case, and to be presented in the court's charge to the jury. *Id.*

12. *Ante-mortem statement—competency of.* The fact, that evidence as to the competency of an *ante-mortem* statement in a criminal prosecution is for the court, is no reason why it should not be received in the presence of the jury. *State v. Murdy*, 603.

13. *Defective verdict.* The jury were directed by the court that in the event of their finding a verdict against the defendant Jordan they should answer a certain interrogatory submitted with the instructions, and return same with their general verdict.

The jury returned a verdict against Jordan without answering the interrogatory. After the verdict had been marked, filed and had been read by the court, the court returned it to the jury with the verbal direction that they "retire and consider further of their verdict, and return a verdict with answer to the special interrogatory submitted in the charge of the court." *Held*, that the action of the court was proper, and that the defendants were not prejudiced thereby. *Judge v. Jordan*, 519.

14. *Special findings—return of verdict without answer.* Where a jury, upon coming into court with their general verdict, declared in open court that they could not answer a question submitted to them for their special finding, *held*, that the refusal of the court to require the jury to again retire, and return their statement as to said question in writing was not erroneous. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

REOPENING CAUSE.

15. *Amendment to pleading after opening argument.* Permission to file an amendment to a pleading after the evidence is closed in a cause tried to the court, and the opening arguments of counsel for the respective parties have been made, will not be disturbed upon appeal when no abuse of discretion is shown. *Larkin v. McManus*, 723.

16. *Additional evidence—discretion of court.* The reopening of an equity cause, after its submission to the court for judgment, for the introduction of further testimony to correct an oversight or mistake, is a matter within the discretion of the trial court, and, in the absence of any showing of prejudice, its action will not be disturbed upon appeal. *Sickles v. Dallas Center Bank*, 408.

17. *Admission of evidence after submission.* After the cause was submitted, and was held under advisement, the court permitted the defendants, on notice to the plaintiff, to file affidavits of parties who had testified upon the trial, that the originals of certain deeds, of which certified copies had been offered in evidence, were not in their possession or control. *Held*, that the reception of the affidavits was a matter resting in the discretion of the court, and no abuse of discretion was shown. *Pitts v. Lewis*, 51.

18. *Certiorari—intervention—admission to plead.* In a proceeding by *certiorari*, commenced by a resident taxpayer of a county, to test the validity of the action of the board of supervisors, whereby the salary of the county attorney was increased, the county attorney is a necessary party, and his admission to plead as a party defendant even after the determination of the cause will not be regarded as an abuse of discretion on the part of the trial court. *Goetzman v. Whitaker*, 527.

PRACTICE AND PROCEDURE. *Continued.*

RECOGNIZANCE.

19. *Order at chambers.* An order requiring a witness to enter into a recognizance for his appearance may be made by a judge at chambers, in a distant county, without notice to the witness, and without his being heard. *Comfort v. Kittle*, 179.

RECORD.

20. *Stipulation as to evidence not offered.* A stipulation between parties to a cause, during the trial thereof, that certain evidence may be received and used in such action so far as the same may be relevant, will not make such evidence a part of the record when it is neither offered nor used in fact upon the trial. *Pitts v. Lewis*, 51.

BILL OF EXCEPTIONS.

21. *Time for appeal—cases triable de novo in supreme court.* In actions triable *de novo* in the supreme court it is sufficient, under Code, section 2742, as amended, if the evidence is made a part of the record within the six months allowed for appeal, and this rule cannot be changed by an order of the trial court prescribing a shorter period in which a bill of exceptions may be filed. *Frank v. Hollands*, 164.

IN PROCEEDINGS TO FIX BOUNDARIES.

22. *Commissioner's report—judgment.* Upon the filing of the commissioner's report herein with the district court, the plaintiff filed objections thereto and moved that judgment be rendered, fixing the corner at a point different from that found by the commissioner. This motion was sustained, and the court rendered judgment accordingly, dividing the costs equally between the parties joining in the contention. *Held*, that this action of the court, except as to costs, was erroneous; that the commissioner's report should have been approved, modified or amended, and judgment rendered accordingly, or the same rejected, and the report re-referred to the commissioner for correction, or the commission set aside, and a new commissioner appointed. *Yocum v. Hoskins*, 436.

See Boundaries, 3.

PRACTICE IN SUPREME COURT.

RECORD.

1. *Abstract—amendments—evidence.* Where on an appeal to the supreme court, an amended abstract of the record is filed by the appellee denying the correctness of the abstract filed by the appellant, and alleging that such amended abstract with appellant's abstract contains all the evidence, and the correctness of the

PRACTICE IN SUPREME COURT. RECORD. *Continued.*

amended abstract is not denied, its statements will be taken as true, and so much of the evidence contained in appellant's abstract as is denied by the amended abstract of the appellee will not be regarded as a part of the record. *Knight v. C., R. I. & P. Ry. Co.*, 310.

2. *Abstract—amendments—transcript.* Where the correctness of appellant's abstract is denied by an additional abstract filed by appellee, and an amended abstract subsequently filed by the appellant makes no denial of appellee's abstract, the supreme court will not look to the transcript to determine the matter, but will accept the statement of appellee's abstract as true. *Brooke v. C., R. I. & P. Ry. Co.*, 504.

3. *Abstract—motion to strike evidence.* Where the evidence submitted on the trial of a cause is not made a part of the record in the district court, an abstract presenting the same on appeal to the supreme court will, on motion, be stricken from the filest *Cass County Bank v. Conrad*, 482.

4. *Abstract—presumption.* Where, in an action commenced as at law, a motion is made to transfer the same to the equity side of the calendar, but the record fails to show any ruling upon such motion nor that the maker of said motion asked that a record be made of the ruling thereon, nor that the cause was thereafter treated as in equity, nor that equitable relief was granted by the trial court, it will be presumed by the supreme court that the motion to transfer was not ruled upon by the trial court. but was abandoned by the maker. *Johnson v. Webster*, 581.

5. *Abstract—presumption.* Where lands have been offered, upon execution sale in separate tracts, pursuant to the requirements of notices given to the sheriff by defendant, as contemplated by section 3088 of the Code, and no bids are received, a sale *en masse* is not *per se* void or voidable, though the several tracts are not contiguous. And where defendant appeals from the overruling of a motion to set such sale aside, and the abstract fails to show what evidence was presented to the court below in support of the motion, this court must presume that there was no evidence requiring the motion to be sustained. *Insurance Co. v. Brown*, 42.

6. *Presumption.* Where the record fails to disclose what were the facts sought to be elicited by questions to which objections were sustained in the trial court, the supreme court will presume that the evidence was rightly rejected. *Blair v. Madison County*, 318.

7. *Documentary evidence—identification.* Where the transcript of the reporter's notes shows that certain documents were offered in evidence, indentified by exhibit marks, and, with two depositions of a witness named, were read upon the trial; and attached

to such transcript are documents bearing exhibit marks identical with those called for in the transcript, and two depositions of the said witness, entitled as in the same cause, and filed in the office of the clerk of district court; and the transcript contains a copy of the judge's certificate to the original report of the evidence in short-hand, certifying that the same, together with the documentary evidence therein referred to, contains all the evidence offered; and the documents and depositions set out in the abstract are identical with those attached to said transcript, the identification of such documents and depositions in question will be deemed sufficient. *Johnston v. McPherran et al.*, 230.

8. *Questions reviewable only on errors assigned.* A proceeding to establish a disputed corner and boundary line under Laws, 1874, chapter 8, is a special proceeding wherein the commissioner's report has the force of the verdict of a jury, and is reviewable on appeal only on errors assigned. *Yocum v. Haskins*, 436.

See Practice and Procedure.

QUESTIONS CONSIDERED ON APPEAL.

9. *Errors not excepted to.* Errors of the trial court to which no objection was made at the time, nor made the ground for a motion for a new trial, but are raised for the first time upon appeal, will not be considered by the supreme court. *Fish v. Chicago, R. I. & P. Ry. Co.*, 280.

10. *Errors not excepted to.* Where the statement of the issues in a cause prepared by the court for the jury was submitted to the attorneys for defendant, and approved by them, the defendant cannot be heard to complain upon appeal that the portion of his defense set out in an amendment to the answer was not submitted to the jury. *Sprague v. Atlee*, 1.

11. *Errors not excepted to.* The error of the trial court in failing to write the word "given" upon the margin of instructions asked, and given to the jury, is not available on appeal to a party who took no exception to such omission in the court below. *Knight C., R. I. & P. Ry. Co.*, 310.

12. *Errors not excepted to—misconduct of counsel in argument.* The use of improper language by counsel in argument to a jury will not constitute ground for the reversal of the judgment of the trial court on appeal when no objection was taken thereto in the court below, nor any instruction asked correcting the error. *Blair v. Madison County*, 313.

13. *Assignment of error generally.* A general assignment of error directed to the court's charge to the jury as a whole, without specifying the particular errors complained of, will not entitle a party to have considered the error contained in any single instruction. *Id.*

PRACTICE IN SUPREME COURT. RECORD. *Continued.*

14. *Issues upon which no evidence was introduced.* Questions pertaining to issues upon which no evidence was introduced in the trial court will not be considered in the supreme court. *Smith v. Eals*, 285.

15. *Instructions not set out in record.* This court cannot pass upon the correctness of an instruction not set out in the record. *State v. Illsley*, 49.

16. *Record must show it contains all the evidence.* The determination of the district court upon the question of the misbehavior of jurors on the trial of a cause cannot be reviewed on appeal when it appears that all the evidence upon that subject is not before the supreme court. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

17. *Rejection of evidence—subject-matter not indicated in record.* As assignment of error based upon the refusal of the trial court to receive the testimony of a witness in answer to a particular question will not be considered by the supreme court where the subject-matter of such testimony is not indicated in the question asked, nor by any statement in the record, and the answer might have been incompetent, irrelevant and immaterial. *State v. Row*, 138.

18. *Objections to models as evidence.* The supreme court cannot determine objections to the correctness of a model of machinery introduced in evidence on the trial in the district court to illustrate certain questions at issue, when such model is not before it. *Grannis v. C., St. P. & K. C. Ry. Co.*, 444.

19. *Cases involving less than one hundred dollars—certificate of judge.* In causes involving less than one hundred dollars, and which are presented for hearing in the supreme court upon questions certified by the judge of the trial court, only questions arising upon the record will be considered, and the supreme court will look beyond the certificate to see if the questions certified are necessarily involved in the case. *Pickrell v. Hiatt*, 537.

20. *Assignments of error not argued.* Assignments of error upon appeal which are not argued by counsel will not be considered by the supreme court. *Johnson v. Webster*, 581; *Estabrook v. Riley & Armin*, 479.

21. *Errors not argued.* Errors which are only indefinitely suggested by counsel upon appeal will not be considered by the supreme court. *Oliver & Miller v. Davis*, 287.

NON-REVERSIBLE ERROR.

22. *Conflict in evidence.* Where the evidence upon the material issues in a cause is conflicting, the verdict of the jury will not be disturbed. *Blair v. Madison County*, 313; *State v. Sipult*, 40.

PRACTICE IN SUPREME COURT.

NON-REVERSIBLE ERROR. *Continued.*

23. *Verdict of jury—evidence.* The verdict of a jury will not be disturbed upon appeal if there is any evidence to support it. *Hagan v. Merchants', etc., Ins. Co.*, 321.

24. *Conflict in evidence—trial to the court—findings.* When a case at law is tried to the court, and the evidence is conflicting, the findings of fact by the trial court will not be disturbed upon appeal if there is evidence tending to support them. *Lansley v. Van Alstyne*, 476.

25. *Error not brought to attention of trial court—excessive verdict.* A new trial will not be ordered upon appeal because the verdict of the jury is excessive in a small sum, nor will a *remittitur* be ordered in such case where the error was not brought to the attention of the court below. *Van Gorder v. Sherman*, 403.

26. *Instructions to jury—neglect to ask more specific.* A court's charge to a jury which contains correct abstract propositions of law, applicable to the case, but which is defective in not being as specific as might be with reference to the facts of the particular case, will not be regarded as reversible error where the party objecting fails to ask for more specific instructions, and there is no showing of prejudice on account of the defective charge. *State v. Watson*, 380.

27. *Error without prejudice—instructions to jury.* Great length in the instructions of the court to the jury, and the frequent use therein of terms calling the attention of the jury to the youth and inexperience of the plaintiff, will not constitute grounds for reversal upon appeal, where there is nothing to indicate in the record that the defendant was prejudiced thereby. *Sprague v. Atlee*, 1.

28. *Erroneous instruction—judgment supported by evidence.* A judgment will not be reversed in the supreme court because of an erroneous instruction to the jury, when such judgment was demanded under the evidence and other instructions correctly given; even though the verdict of the jury may have been based upon the erroneous instruction. *Newell & Co. v. Martin et al.*, 238.

29. *Error without prejudice—secondary evidence.* After proof of the loss of a letter received by the defendant, in company with an affidavit to the facts charged in the alleged libelous article, the defendant proposed to show the contents of such letter to be, that the writer had investigated the case, and was satisfied that the facts set out in the affidavit were true, but there was no ruling upon the offer of such proof, nor any effort to introduce the evidence after making the offer. *Held*, that, while the defendant would have been entitled to prove the contents of the letter as stated, no error could be predicated upon the refusal of the district court to admit secondary evidence of such letter before defendant's statement of what he expected to prove thereby. *State v. Conable*, 60.

PRACTICE IN SUPREME COURT.

NON-REVERSIBLE ERROR. *Continued.*

30. *Matters in discretion of trial court—prejudice.* The reopening of an equity cause, after its submission to the court for judgment, for the introduction of further testimony to correct an oversight or mistake, is a matter within the discretion of the trial court, and, in the absence of any showing of prejudice, its action will not be disturbed upon appeal. *Sickles v. Dallas Center Bank*, 408.

31. *Instructions to jury—erroneous paragraph elsewhere modified.* A judgment will not be reversed by the supreme court because a single paragraph of the trial court's charge to the jury, when taken alone, is susceptible to the interpretation of an erroneous statement of the law, when the language of such paragraph is elsewhere properly modified and explained, and the charge taken as a whole correctly presents the law to the jury. *Fish v. Chicago, R. I. & P. Ry. Co.*, 280.

32. *Instructions to jury.* The fact that the evidence submitted to a jury in an instruction as proper for their consideration in determining the question, whether the testimony of the prosecutrix in a prosecution for rape is corroborated in the manner that the law requires, is not such corroborative evidence, will not constitute the giving of such instruction a reversible error, when the record shows there was other evidence, not referred to in said instruction, that is in fact corroborative. *State v. Watson*, 380.

MOTIONS.

33. *Proof of service—record.* The supreme court will not consider a motion filed in that court when there is no proof of service thereof of record. *Blasser v. Moats*, 460.

PRINCIPAL AND AGENT. See Agency.

PROMISSORY NOTES. See Bills and Notes.

PROPERTY (PERSONAL).

INTERMINGLING OF GOODS.

1. *Officer levying attachment must distinguish.* The plaintiff having mingled the goods in question with goods belonging to her husband. but afterwards transferred to her, *held*, that, before the officer serving the writ of attachment could escape liability for a levy upon the latter goods, he must show that he made a reasonable effort to distinguish them and separate them, and was unable to do so, or that from the nature of the mixture, they of necessity could not be separated. *Allen v. Kirk*, 658.

2. *Ownership not forfeited.* The intermingling of goods purchased with the intention to hinder, delay or defraud the creditors of the vendor, with other goods belonging to the vendee, will not operate as a forfeiture of ownership in the latter, in the absence of any showing that they are not distinguishable from the goods so purchased. *Id.*

PUBLIC LANDS.

HOMESTEAD ENTRY.

Prior agreement to convey. The plaintiff and defendant having occupied different portions of a tract of public land, and improved the same, went to the land-office together with a view to making homestead entries therefor, and then discovered that it was necessary that the whole of the land be entered by one person. It was thereupon agreed that the plaintiff enter the entire tract, and, upon acquiring title, convey to defendant the portion occupied by him. *Held*, that the agreement was valid. *Sweesey v. Sparling*, 433.

QUIETING TITLE.

WHO MAY MAINTAIN ACTION.

1. *Adverse possession.* Actual adverse possession of real estate for ten years creates a title by prescription, and is a sufficient basis on which to maintain an action to quiet the title thereto. *Cramer v. Clow*, 255.

2. *Devisee under will,* A devisee under a will is entitled to have his title to real estate so received quieted as against any claims of the wife of the testator, who has released by an antenuptial agreement the interest which the law secures to the wife in the estate of her husband. *Peet v. Peet*, 172.

3. *Party holding under deed defectively acknowledged.* The defendant claiming title under a warranty deed defectively acknowledged, entered upon a piece of wild land, and for more than ten years cultivated it, and paid the taxes thereon, and for nearly ten years previous to the commencement of this action had occupied it as a home, and made improvements upon it amounting to between three and four thousand dollars. *Held*, that defendants were entitled to have their title quieted as against the plaintiff, who claimed title to the land under a warranty deed executed subsequent to that of defendants by the same grantor, but filed for record before the deed to defendants. *Cramer v. Clow*, 255.

RAPE.

PROOF OF.

1. *Declarations.* The testimony of a witness, upon a prosecution for rape that the subject of the rape "told her the whole circumstance," but not relating the circumstances, is error without prejudice. *State v. Watson*, 380.

2. *Leading questions.* Upon a trial under an indictment for rape committed upon a girl of immature years, leading questions may, in the discretion of the court, be asked the girl as to the position occupied by the accused at the time the act is alleged to have

RAPE. PROOF OF. *Continued.*

been performed, as to any pain caused her by defendant's act, and as to evidences of violence subsequently found upon her clothing. *Id.*

8. *Testimony in rebuttal.* Where, upon a trial under an indictment for rape, the prosecuting witness has given explicit testimony to the fact of the penetration of her body, and a physician, who had examined her organs shortly after the act is alleged to have been committed, testifies, upon behalf of the accused, that at the time of his examination he found the hymen "intact" and "without rupture," testimony by physicians for the prosecution as to the condition of the hymen at the time of an examination subsequently made by them, and indicating penetration in fact, is competent as proof in rebuttal. *Id.*

RATIFICATION.

OF ACTS OF AGENT BY PRINCIPAL. See Agency, 8; Negligence, 11.

RECOGNIZANCE.

REQUIRED OF WITNESSES.

1. *Construction of statute.* Section 4385 of the Code being an exact transcript of section 4744 of the Revision of 1860, except in the substitution of the word "cognizance" in the latter statute for "recognizance," and from the inapplicability of a cognizance to the evident purposes of the statute, the above change of words must be deemed to have been made by mistake in transcribing the section of the revision, and the section as it now stands in the Code is to be construed as authorizing courts and judges to require a "recognizance" for the appearance of witnesses in criminal proceedings. *Comfort v. Kittle*, 179.

FORM OF.

2. *Bond with sureties.* Section 4385 of the Code does not authorize district courts or judges to require of witnesses written undertakings, *with sureties*, conditioned upon their attendance at criminal proceedings, nor to order their arrest and imprisonment as security for such attendance. The provisions of sections 4248 to 4251 of the Code, giving such authority to magistrates on preliminary examination, are not applicable to judges of the district court. *Id.*

COURT MAY ORDER AT CHAMBERS.

3. *An order requiring a witness* to enter into a recognizance for his appearance may be made by a judge at chambers, in a distant county, without notice to the witness, and without his being heard. *Id.*

RECORDING ACTS. See Notice (Constructive).

REMEDY.

ELECTION BETWEEN. See Assignment for Benefit of Creditors, 4.

REPLEVIN.

VOID BILL OF EXCHANGE.

1. *Invalidity.* The acceptor of a bill of exchange, that has become void in the hands of the holder thereof, may maintain replevin for the possession of the same. *Smith v. Eals*, 235.

PROPERTY HELD UNDER ATTACHMENT.

2. *The provisions of section* 3019 of the Code of 1873 have no application to actions to recover the possession of specific articles of personal property held by a sheriff under a writ of attachment. *Linden v. Green*, 365.

WRIT.

3. *May be served by constable.* A writ of replevin issued out of the district court may be served by a constable. *Smith v. Eals*, 235.

See Agency, 3; Bills and Notes, 5.

RES ADJUDICATA. See Former Adjudication.

SALES.

IN CONTEMPLATION OF DECEASE.

1. *Validity.* A transfer of personal property in contemplation of one's approaching decease will not be disturbed in the absence of any showing that there are debts due from the estate of the grantor. *In re Estate of Hoffman*, 292.

DESCRIPTION OF PROPERTY.

2. *Construction.* A conveyance of real estate, made by a widow woman to her son, just preceding her death, contained this clause: "And also one-half of all personal property, of every name or nature, attached to the above real estate." *Held*, that, in view of the facts and circumstances surrounding the parties at the time of the transfer, the deed was to be construed as referring to all the personal property upon the real estate described, and not simply to such as is designated by law as fixtures. *Id.*

DELIVERY OF DEED.

3. *Evidence.* The notary who drew the above deed testified that he delivered the same to the grantee, but on cross-examination stated, that the deed was left with some notes in his possession, with the understanding that he should hold them, so that in case the grantor should recover "she could have the property if she liked," and that there was to be no delivery of the deed until she died. On redirect examination the witness stated that he did

not recollect that the grantor said anything to him about holding the deed, but that he had held the same at the request of the grantee. *Held*, that, this being a proceeding in probate, the finding of the district court that there was a delivery of the deed has the force of a verdict of a jury, and the same would not be disturbed. *Id.*

NOTICE.

4. *Possession—recording—execution.* A son purchased, with money loaned him by his father, a one-half interest in a stock of merchandise. Afterwards, by written agreement, he relinquished all interest in the property to the father, but providing that he should continue to conduct the business, and should become owner of one-half of the same when payment of an amount stated should be made. This agreement was not recorded, and the son continued in possession of the property. An execution having been levied upon the property to satisfy a judgment against the son, the father sought to recover the same by replevin. *Held*, that, in the absence of actual knowledge of the above agreement before the levy, one-half of the interest in the property was subject to the execution. *McIntosh v. Wilson*, 339.

CONFLICTING CONVEYANCES.

5. *Notice—mortgage—evidence.* In an action to recover the possession of personal property the plaintiff claimed title under a mortgage from one W., while defendant's title was based upon a mortgage of prior date from S., the vendee of W. The latter mortgage plaintiff claimed to be invalid as against his, because when his mortgage was received from W. there had been no change in the possession of the property, nor was there any conveyance thereof of record. *Held*, that the possession of the property being an issue to be tried, the defendant's mortgage was properly received in evidence in proof of his title against plaintiff's objection. *Lansley v. Van Alstyne*, 476.

6. *Notice—evidence.* Testimony of third persons on behalf of a mortgagee of chattels as to whether they had heard of the sale to defendant's mortgagor, *held* immaterial. *Id.*

RESCISSION.

7. *Upon ground of fraud.* The plaintiff agreed to sell to the defendant certain specific articles of household furniture situated in a hotel for a sum named, but before delivery he removed a number of articles from the premises, and substituted for some other articles of less value. Upon discovery of these facts the defendant refused to carry out the agreement, and left the property in the possession of the plaintiff. *Held*, that the defendant was entitled to rescind the sale, and recover of the plaintiff the money paid thereunder. *Kuhlman v. Wood*, 128.

SALES. *Continued.*

WARRANTY.

8. *Action for breach of—damages.* In an action for damages for a breach of warranty in a sale of a stallion, warranted to be a "sure colt getter," it was alleged in the pleadings that it was understood by the vendor at the time of the purchase, that the horse was for breeding purposes, and that he knew his warranty to be false. *Held*, that, in addition to the difference between the actual value of the horse when received, and what his value would have been, if according to the warranty, the vendee was entitled to recover, as special damages, the reasonable costs and expenses incurred for advertising, keeping and standing the horse for breeding purposes, prior to the discovery of the breach of the warranty. *Short v. Matterson*, 638.

9. *Right of action for breach of—return of property.* The right of the vendee to recover in such case is not dependent upon the return of, or an offer to return, the horse, upon the discovery of a breach of the warranty. *Id.*

10. *Breach of—evidence—knowledge of vendor.* The fact that a special finding of the jury, that the horse got with foal only nineteen per cent. of the mares served in previous years, is not supported by the evidence, *held*, not material, as such finding went simply to show the vendor's knowledge that the warranty was false at the time of the sale, and such knowledge was not essential to the vendee's right to recover damages, as above stated. *Id.*

SCHOOLS.

SCHOOL DISTRICT.

1. *Location of schoolhouse—mandamus.* The board of directors of a school district will not be compelled by *mandamus* to relocate and remove a schoolhouse from one subdistrict to another, pursuant to a resolution passed by the board, upon the petition of residents of the subdistrict where such schoolhouse is situated, when the conduct of the board is in accord with the wishes of the electors of the district township as expressed at their annual meeting, and it does not appear that the petitioners will be prejudiced thereby. *Peters v. Warner*, 335.

SELF-DEFENSE. See Murder, 1, 2, 3, 4, 5.

STATUTES.

ACTS OF GENERAL ASSEMBLY.

1. *Title—validity.* The omission from an act of the general assembly of any reference to the number and name of a chapter of the Code amended thereby, as provided by Code, section 88, will not invalidate such act, even though the secretary of state fail to supply such omission as required by the same section. *State v. Shreves*, 615.

STATUTES. ACTS OF GENERAL ASSEMBLY. *Continued.*

2. *Description of subject in title.* The subject of a legislative act prohibiting the sale of any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, unless it be labeled "compound lard," and designate the name and proportion of each ingredient contained therein, is sufficiently described in the title, "An act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof." *State v. Snow*, 642.

CONSTRUCTION.

3. *Information—sale of compound lard.* An information charging a person with selling a bucket or package filled with an article intended for use as lard, which contained other ingredients than the pure fat of healthy swine, and which bucket or package did not bear on the top or outer side thereof the name and proportion, in pounds and fractional parts, of each ingredient contained therein, sufficiently charges an offense under Acts, Twenty-second General Assembly, chapter 79. *Id.*

4. *Criminal procedure—witnesses—recognizance.* Section 4385 of the Code being an exact transcript of section 4744 of the Revision of 1860, except in the substitution of the word "cognizance" in the later statute for "recognizance," and from the inapplicability of a cognizance to the evident purposes of the statute, the change of words must be deemed to have been made by mistake in transcribing the section of the revision, and the section as it now stands in the Code is to be construed as authorizing courts and judges to require a "recognizance" for the appearance of witnesses in criminal proceedings. *Comfort v. Kittle*, 179.

STATUTES CITED, CONSTRUED, ETC. See page xxxiv.

SURETIES.

CONTRIBUTION.

Claim against estate of decedent—demurrer. A claim filed against the estate of a decedent alleged the indebtedness of said estate to the claimant on account of the payment by him of one-third of the amount of a judgment against the decedent, the claimant, and another in a sum stated, with interest. *Held*, on demurrer, that the facts stated did not entitle the claimant to the relief demanded. *Pickerell v. Hiatt*, 587.

See Assignment for Benefit of Creditors.

TABLE OF CASES CITED, CONSTRUED, ETC. See page xxv.

TAXATION AND TAX TITLES.

PERSONAL PROPERTY.

1. *Lien on real estate—priorty of liens.* Taxes levied upon personal property subsequent to the foreclosure of a mortgage against real estate owned by the taxpayer, and to the sale thereof

under special execution, but while the right of redemption remains in the taxpayer, become, under the provisions of Code, section 865, a lien upon such mortgaged real estate, which is entitled to priority over the rights of the purchaser at the foreclosure sale. [GRANGER and ROBINSON, JJ., *dissenting.*] *New England Loan & Trust Co. v. Young*, 732.

TAX SALE.

2. *Notice to redeem—when unnecessary.* Under Code, section 894, a notice to redeem is not required, when there is no person in possession thereof, and the same is not taxed to anyone by name on the tax books. *Brown v. Poole*, 455.

3. *Notice to redeem—owners unknown.* Where real property sold for taxes is not taxed to any person by name upon the tax books, and the name of the owner during any of the years, for the taxes of which the property is sold, is unknown, no notice of the expiration of the period of redemption from such sale is required, and the publication of a notice addressed to "unknown owners," which would have been insufficient had the names of the owners been known, will not render the sale invalid. *Lawrence & Burd v. Hornick*, 193.

4. *Notice to redeem—service on purchaser at sale.* Notice of the expiration of the time for redemption from a tax sale need not be served upon the purchaser at such sale because the property sold appears on the tax lists as having been assessed in his name. *Brown v. Poole*, 455.

5. *Notice to redeem—what constitutes possession.* For some time preceding the date on which the service of notice of the expiration of the time for redemption must have been served the defendant had a corral on the southeast quarter of the section wherein the land in question is situated, and, without the assertion of any claim or right to do so, herded five hundred head of cattle belonging to himself and others over a range of open and uncultivated land, extending from one to two miles from the corral, and including the land in controversy. *Held*, that the defendant's possession was not such as entitled him to notice under the above statute. *Id.*

6. *Delinquent taxes not carried forward—effect.* The omission of the county treasurer to carry forward from year to year upon the tax lists the delinquent taxes assessed against certain described real estate, and for which the property is eventually sold, will not render such sale void, but only voidable, and the title based thereon cannot be assailed on that account after five years from the recording of the deed. *Lawrence & Burd v. Hornick*, 193.

TAXATION AND TAX TITLES. TAX SALE. *Continued.*

7. *Purchase by treasurer—effect.* The purchase of property at tax sale by the county treasurer renders the sale only voidable, and the same cannot be attacked on that account after five years from the recording of the tax deed. *Id.*

TAX DEED.

8. *Validity—attack—pleading.* Where, in a contest over the title to real estate, the respective parties claim under different tax deeds, and there is neither allegation nor proof of the payment of taxes by either party, and neither has demurred to the pleading of the other, both parties will be deemed to have waived all question on this subject. *Pitts v. Lewis*, 51.

9. *Validity of title—pleading.* An allegation of ownership under a tax deed by one party to a cause, and a general denial by the opposite party, puts in issue every question as to the validity of such deed that is open to investigation. *Id.*

10. *Under sale for taxes owing another county void—organization of county—judicial notice.* A tax deed issued by a county in pursuance of a sale of land for taxes due another county is void; and courts will take judicial notice of the time of the organization of such counties with respect to such sale. *Ellsworth v. Nelson*, 56; *Pitts v. Lewis*, 51.

11. *Notice—laches of owner—estoppel.* A tax deed issued upon insufficient notice will not be deemed invalid as against one claiming the property as owner, whose interest therein does not appear of record, and who for nearly twenty-eight years stood silently by and permitted others to pay the taxes thereon, and spend money and labor in acquiring title and improving the land. *Baird v. Ellsworth*, 629.

12. *Description—void for uncertainty.* A tax deed describing the property conveyed as the "undivided twenty acres, the southeast quarter of the southwest quarter of section ten," etc,, is void for uncertainty. *Ellsworth v. Nelson*, 56.

See Mandamus.

TITLE BY PRESCRIPTION.

ACTS SUPPORTING.

1. *Adverse possession for ten years.* Actual adverse possession of real estate for ten years creates a title by prescription, and is a sufficient basis on which to maintain an action to quiet the title thereto. *Cramer v. Clow*, 255.

2. *Possession under deed defectively acknowledged.* The defendants, claiming title under a warranty deed defectively acknowledged, entered upon a piece of wild land, and for more than ten years cultivated it, and paid the taxes thereon, and for nearly ten

TITLE BY PRESCRIPTION. ACTS SUPPORTING. *Continued.*

years previous to the commencement of this action had occupied it as a home, and made improvements upon it amounting to between three and four thousands of dollars. *Held*, that defendants were entitled to have their title quieted as against the plaintiff, who claimed title to the land under a warranty deed executed subsequent to that of defendants by the same grantor, but filed for record before the deed to defendants. *Id.*

HIGHWAYS.

3. *Thirty years' adverse possession.* The failure of the public to assert any right to a strip of land over which a public highway had been established for nearly thirty years, and the continued and adverse use and occupation of the same by the plaintiff and his grantors, in good faith, for nearly that length of time, *held*, sufficient to vest a title to such land in the plaintiff by prescription, although the person originally taking possession thereof had knowledge of a road having been established thereon. *Smith v. Gorrell*, 218.

4. *Boundaries—estoppel.* The plaintiff caused a highway to be located across lands owned by him, sold a lot on one side thereof, and afterwards built a fence along said road on the side of the land retained by him, and his grantee built a fence on his side. The space between these two fences was worked and traveled by the public for twenty-five years, and after twenty years the plaintiff rebuilt his fence on the same line. *Held*, that the boundaries of such highway had been established by the acts of the plaintiff, and of the public, and by lapse of time, and that plaintiff was estopped from claiming any portion of said road as his own. *Sherman v. Hastings*, 372.

TRADE.

REGULATION OF. See Constitutional Law.

TRESPASS. See Indictment.

TRUSTS.

ACCOUNTING.

1. *Receipt—estoppel.* A *cestui que trust* is not estopped from claiming an accounting with his trustee because of a receipt made to the latter acknowledging full satisfaction of the interest of the *cestui que trust* in the trust estate, and discharging the trustee from further liability therein, where the settlement in pursuance of which such receipt was made was based upon the false representations of the trustee, and the *cestui que trust* was ignorant of the real condition of the estate. *Barton v. Fuson*, 575.

TRUSTS. *Continued.*

TRUSTEE.

2. *Dishonesty in execution of trust.* Carelessness or dishonesty in the disposition of property under a general assignment on the part of those intrusted with the execution of the trust will not invalidate the deed of assignment. *Bradley v. Bischel,* 80.

USURY.

RETENTION OF PART OF PRINCIPAL.

1. *The retention by a lender* of the sum of twenty-one dollars out of a loan of seven hundred dollars, evidenced by a note providing for the highest rate of interest allowed by law, will render the contract usurious. *Lombard v. Gregory,* 569.

JUDGMENT.

2. *Credits on principal—foreclosure of mortgage.* In an action upon a note tainted with usury, and for the foreclosure of a mortgage given to secure the same, the payee will be entitled to judgment for the amount of the principal only, less the sum of all payments upon such usurious contract, and to a degree for the enforcement of his mortgage to such extent only. *Id.*

3. *Forfeiture to school fund.* Where usury is established in an action upon any contract, judgment will be rendered against the borrower, in favor of the school fund, in a sum equal to ten per cent. per annum upon the amount of the principal sum loaned, less the sum of all payments made under the contract. *Id.*

VENUE.

LIMITATION OF IN CONTRACTS.

1. *Validity.* A condition in a contract limiting the venue or place where action may be brought thereon is invalid. *Matt v. Mutual Aid Ass'n of Ottumwa,* 135.

CHANGE OF.

2. *Time of application—delay.* Forty days after indictment, and upon the eleventh day of the following term of court, and after his case was called for trial, the defendant filed a motion for a change of venue on the ground of prejudice, supported by his own affidavit, and those of three other persons. The next morning the state filed counter-affidavits of eleven persons, and the defendant asked until two o'clock in the afternoon to file additional affidavits. *Held,* that, no excuse for defendant's delay in making the application being shown, there was no abuse of discretion by the district court in refusing to grant defendant's request for additional time. *State v. Adams,* 593.

VENUE. CHANGE OF. *Continued.*

3. *Prejudice of people.* The defendant, an editor of a newspaper, was indicted upon a charge of criminal libel, based upon articles published in his paper during a political campaign charging a political opponent who was a member of congress, and a candidate for re-election, with gross misconduct in office. An application for a change of the place of trial to a county outside of the congressional district upon the ground of prejudice, based upon the facts above stated and the further facts, that all of the counties in the district were "largely democratic," the political party of the subject of the alleged libel, and that juries in those counties would be apt to be made up chiefly, if not wholly, from members of that party, was overruled by the district court. *Held*, no error; that the allegation in the defendant's petition, that the several counties in the district were "largely democratic," warranted the inference, in the absence of a showing to the contrary, that the political contest in the district was not sufficiently close to cause general bitterness or excitement as a result of the publication of the alleged libelous matter. *State v. Conable*, 60.

4. *Nominal party not entitled to.* A defendant who is only a nominal party to a cause cannot compel a change in the place of trial without the concurrence of his codefendant who is the real party in interest, and who has filed an answer to plaintiff's petition prior to the application for a transfer of the cause. *Omaha, etc., Ry. Co. v. O'Neill*, 463.

VERDICT.

MUST BE IN ACCORD WITH INSTRUCTIONS.

1. *A verdict of a jury* that has been found against an instruction of the court will be set aside, even though such instruction contain an erroneous statement of law. *State v. Moore*, 578.

SPECIAL FINDINGS.

2. *Failure of jury to answer—practice.* The jury were directed by the court that in the event of their finding a verdict against the defendant Jordan they should answer a certain interrogatory submitted with the instructions, and return same with their general verdict. The jury returned a verdict against Jordan without answering the interrogatory. After the verdict had been marked filed, and had been read by the court, the court returned it to the jury with the verbal direction that they "retire and consider further of their verdict, and return a verdict with answer to the special interrogatory submitted in the charge of the court." *Held*, that the action of the court was proper, and that defendants were not prejudiced thereby. *Judge v. Jordan*, 519.

VERDICT. SPECIAL FINDINGS. *Continued.*

EXCESSIVE.

3. *In small sum—remittitur.* A new trial will not be ordered upon appeal because the verdict of the jury is excessive in a small sum, nor will a *remittitur* be ordered in such case where the error was not brought to the attention of the court below. *Van Gorder v. Sherman*, 403.

WHEN WILL BE SET ASIDE.

4. *The trial judge* in announcing his reasons for overruling the motion for a new trial stated, that if he were the jury trying this case he should render a verdict of not guilty; that it was possible that the defendant shot the deceased, but not probable; and that he thought, if there were no appeal he should set the verdict aside. The remarks of the judge were, at his direction, taken down by the reporter, and were made a part of the record. *Held*, that the record sufficiently indicated that in the opinion of the district court the verdict was not supported by the evidence, and it was its duty, therefore, upon that ground, to have granted the defendant a new trial as provided by law; and that, having failed to do so, its judgment should for such reason be reversed, independent of the views of the supreme court of the sufficiency of the evidence to sustain the verdict. *State v. Billings*, 99.

WHEN FINAL.

5. *Supported by some evidence.* The verdict of a jury will not be disturbed upon appeal if there is any evidence to support it. *Hagan v. Merchants', etc., Ins. Co.*, 321.

6. *Conflict in evidence.* Where the evidence upon the material issues in a cause is conflicting, the verdict of the jury will not be disturbed. *Blair v. Madison County*, 313.

7. *Credibility of witness—conflict in testimony.* The credibility of the testimony of a witness is for the jury to determine, and its verdict will not be set aside, because the testimony whereon it is based is apparently in conflict with that given by the witness upon another trial. *Judge v. Jordan*, 519.

8. *Sufficiency of evidence.* While the evidence in this case as to probable cause and good faith is such that the jury might well have found the alleged libelous article privileged within the rule heretofore announced by this court, and the evidence tends to show that the defendant believed the same to be true, yet the evidence being conflicting upon the question of the motive of the defendant in making such publication, the court cannot say that in finding the defendant guilty, as charged, the jury abused the discretion which the law gives them. *State v. Conable*, 60.

VERDICT. WHEN FINAL. *Continued.*

9. *Special findings inconsistent with general verdict.* Where the general verdict returned by the jury is for a smaller sum than what would seem to be warranted by its special findings, it will not be set aside as inconsistent with the latter where, under the evidence, the jury may have based its verdict upon its findings of facts not covered by its special findings. *Kemper v. City of Burlington*, 354.

VERIFICATION.

PLEADING.

Attachment. The provisions of section 2672 of the Code, requiring that affidavits in verification of pleadings show the competency of the affiant to make the verification, are not applicable to affidavits made under section 2951 of the Code as the basis for the issuance of writs of attachment. *Sioux Val. State Bank v. Kellog*, 124.

WAIVER. See Agency, 2; Assignment for Benefit of Creditors, 5.

WATER WAYS.

RIGHTS OF ADJOINING OWNER.

Removing ice from—injunction. Where a mill-owner owns the water in a river flowing over the land of an adjoining owner, the removal of ice from the river at such point, under license from such adjoining owner, is not such an infringement of the mill-owner's rights as, in the absence of proof of substantial injury therefrom, will entitle him to an injunction. *Lathrop v. Haley*, 649.

WILLS.

CONSTRUCTION.

1. *Heir or devisee may maintain action for—accounting.* One claiming to be an heir of a testator, and also a devisee and legatee under his will, is entitled to maintain a suit in equity to obtain a construction of such will, and have his interest as devisee and legatee, if the will be valid, or as heir, if it be invalid, determined, and have an accounting with the executor for his share in the estate, and an order for the payment of the same. *Wintermute v. Heinly*, 169.

RIGHTS OF WIDOW.

2. *Homestead—election by widow—presumption from occupation.* A will left by a husband gave to his wife one-third interest in his property, consisting of a homestead. and to his daughter the remaining two-thirds. The widow and her son, with the defendant, a daughter by another husband, occupied the premises until the widow's death, a period of nearly ten years, but there was

WILLS. RIGHTS OF WIDOW. *Continued.*

some evidence that such occupation was not exclusive of the rights of the daughter owning the two-thirds under the will, though she did not reside there. Shortly before the widow's death she conveyed her interest in the property to the defendant. *Held*, that the conduct of the widow did not amount to an election to take her homestead right under the statute, Code, section 2008, instead of under the will, and that the conveyance to the defendant passed an undivided third interest in the property. *Larkin v. McManus*, 723.

RIGHTS OF DEVISEE.

3. *May have title to real estate quieted.* A devisee under a will is entitled to have his title to real estate so received quieted as against any claims of the wife of the testator, who has released by an antenuptial agreement the interest which the law secures to the wife in the estate of her husband. *Peet v. Peet*, 172.

CONTEST OF.

4. *Action for must be brought within five years.* In an action to quiet the title to certain real estate, the defendant filed a cross-petition, alleging that the will under which the plaintiff claimed was invalid for reasons stated, and that the probate thereof was obtained by the plaintiff through fraud. The action was commenced more than six years after the probate of the will. *Held*, that actions assailing the validity of wills must be brought within five years after their admission to probate, and that the defendant's cross-petition should, therefore, be dismissed. [ROBINSON, J., *dissenting.*] *Willard v. Wright*, 714.

WITNESSES.

CREDIBILITY.

1. *Testimony found to be false may be disregarded.* An instruction to jury, that if they found that a witness had testified falsely as to material matters, knowingly and intentionally, they *might* disregard his testimony altogether, is not erroneous. *Judge v. Jordan*, 519.

2. *A question for the jury—verdict.* The credibility of the testimony of a witness is for the jury to determine, and its verdict will not be set aside, because the testimony whereon it is based is apparently in conflict with that given by the witness upon another trial. *Id.*

IMPEACHMENT OF.

3. *Cross-examination may show he has been inmate of county jail.* A party against whom a witness is used is entitled to question him on cross-examination as to his past and present associations, business and residence, even though the examination elicit the fact that he has been an inmate of the county jail. *State v. Row*, 138.

WITNESSES. IMPEACHMENT OF. *Continued.*

4. *Cross-examination—former conviction of penal offenses.* A person on trial for a criminal offense, who testifies in his own behalf, may, for the purposes of impeachment, be questioned on cross-examination as to former convictions for offenses previously committed by him. *State v. O'Brien*, 98.

RECOGNIZANCE.

5. *In criminal proceedings—bond with sureties.* Section 4385 of the Code does not authorize district courts or judges to require of witnesses written undertakings, *with sureties*, conditioned upon their attendance at criminal proceedings, nor to order their arrest and imprisonment as security for such attendance. The provisions of sections 4248 to 4251 of the Code, giving such authority to magistrates on preliminary examination, are not applicable to judges of the district court. *Comfort v. Kittle*, 179.

See Husband and Wife, 5.